

JUL 27 1976

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, AND FLOYD
SNYDER, INDIVIDUALLY AND AS SUPERVISOR OF THE
TOWN OF LOCKPORT,

*Appellants,**vs.*

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL
LEVEL, INC. AND FRANCIS W. SHEDD, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees,

AND

JOHN J. GHEZZI, SECRETARY OF STATE OF THE STATE OF
NEW YORK, ARTHUR LEVITT, COMPTROLLER OF THE
STATE OF NEW YORK, LAVERNE S. GRAF, CLERK OF THE
COUNTY LEGISLATURE, COUNTY OF NIAGARA, NEW YORK AND
KENNETH COMERFORD, COUNTY CLERK, COUNTY OF
NIAGARA, NEW YORK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

FILED FEBRUARY 17, 1976
PROBABLE JURISDICTION NOTED JUNE 7, 1976

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UNITED STATES DISTRICT COURT

Western District of New York

May 4, 1973, Filed complaint.

May 25, 1973, Filed Answer for defts., Graf & Comerford.

May 31, 1973, Filed Stipulation extending for 20 days time to answer of defts. Lomenzo & Levitt.

June 8, 1973, Filed Summons & Mar. ret. on S&C served 5-8-73 on LaVerne Graff; on Arthur Levitt; no service on Lomenzo.

June 14, 1973, Filed Deft's Notice to motion to dismiss ret. 6-21-73; adj 6-28-73; 7-12-73; by consent to 8-13-73.

July 9, 1973, Filed Pltf's motion to strike defense ret. 7-12-73; by consent to 8-13-73.

Aug. 3, 1973, Filed Pltfs. motion to amend complaint ret. 8-6-73.

Aug. 6, 1973, Filed Pltfs. affidavit.

Oct. 29, 1973, Filed order granting motion of 8-2-73 & that Citizens for Action at the Local Level, Inc. is added as 1st Pty. Pltf & complaint is hereby amended in accordance with the proposed amended complaint & the amended complaint by service upon attys of record for the Deft. together with a copy of Order within 10 days from entry-Henderson, DJ Notice & copies to Samuel Tavano, Michael Wolfgang & Moot, Sprague, Marcy, Landy, Fernbach & Smythe.

Apr. 24, 1974, Filed order requesting Hon. Chief Judge of U.S. Ct. of Appeals to convene a 3-judge court-Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz & Miles A. Lance.

May 28, 1974, Filed Pltfs. notice of motion for summary judgment ret. 6-20-74.

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May 30, 1974, Filed Pltfs. notice of motion to require admissions ret. 6-10-74.

June 6, 1974, Filed Defts., John J. Ghezzi & Arthur Levitt answer & motion for summary judgment.

June 7, 1974, Filed Defts. Ghezzi & Levitt, answer to requested admissions.

June 10, 1974, Motion by Pltf. for order requiring defts. to admit facts adj. to 6-12-74 at 9:00 a.m.

June 14, 1974, Filed Defts. Comerford & Graf answering affidavit.

June 20, 1974, Oral argument on motion by pltf. to declare unconstitutional Sec. 33(7) of the Municipal Home Rule Law of the State of N.Y. etc. Decision reserved.

Nov. 21, 1974, Filed Pltfs. review of the memorandum decision of this Ct. in the prior action & the reasons why the principle of collateral estoppel should not be applied to defeat the claim of the aggrieved voters of Niagara County, the class action pltfs. now before this court.

Nov. 22, 1974, Filed order of 3-Judge Ct. granting pltfs. summary judgment & denying defts. motion for summary judgment etc.—Timbers, Burke, & Curtin, Judges Notice & copies to John J. Phelan, Michael Wolfgang & Miles A. Lance.

Dec. 9, 1974, Settle judgment adj. to 12-23-74 for briefs. Submitted.

Jan. 9, 1975, Filed Declaratory Judgement and Injunction, granting Pltfs' motion for summary judgment, denying defts' motion for summary judgment, declaring unconstitutional certain sections of New York State Constitution and Municipal Home Rule of the State of New York, and direct-

Relevant Docket Entries.

ing Defts. to file and implement Niagara County charter set forth in Local Law No. 1 of 1972 for Niag. Co.—Timbers, Cj Burke, DJ and Curtin, DJ Notice & copies to Miles A. Lance, and Michael G. Wolfgang.

Feb. 27, 1975, Filed order to show cause for intervention of Town of Lockport & Floyd Snyder etc. as parties deft. for the purpose of prosecuting an appeal etc. ret. 3-3-75—Curtin, DJ.

Mar. 3, 1975, Motion by Twn. of Lockport to intervene in the appeal. Submitted.

Mar. 5, 1975, Filed Petrs. memorandum in support of intervention.

Mar. 5, 1975, Filed Pltfs. Francis W. Shedd affidavit.

Mar. 5, 1975, Filed order allowing applicants to intervene in this action & denying the application made at the oral argument on 3-3-75 for stay of the judgment previously entered etc.—Curtin, DJ Notice & copies to Francis W. Shedd, Louis J. Lefkowitz, Samuel L. Tavano, Hodgson, Russ, Andrews, etc.

Mar. 6, 1975, Filed Intervening Defts'. Notice of Appeal to the Supreme Court.

Mar. 6, 1975, Filed Intervening Defts'. affidavit of service of notice of appeal.

Mar. 23, 1975, Filed Petrs., Twn. of Huntington & Kenneth C. Butterfield, motion to intervene as party defts etc. ret. 4-28-75. Motion denied.

May 2, 1975, Filed decision & order denying the motion of the Twn. of Huntington & its Supervisor for intervention, etc.—Curtin, DJ Notice & copies to Messrs. Phelan, Lefkowitz, Tavano, Fuzak & Corso.

Relevant Docket Entries.

May 2, 1975, Original papers, docket entries and Clerk's certificate mailed to Clerk, U.S. Supreme Court pursuant to request of Victor T. Fuzak, Esq.

May 14, 1975, Filed Intervening deft., Twn. of Lockport motion for stay of enforcement of judgement ret. 5-19-75 Ct. to file order.

May 16, 1975, Filed affidavit of Samuel L. Tavano, Cty. Atty. for Lockport in opposition to motion for the stay of enforcement of judgment.

May 21, 1975, Filed letter to Judges, Timbers, Burke & Curtin dated 5-20-75 from John J. Phelan regarding the position of the pltfs. in this action.

May 22, 1975, Filed decision & order denying the intervening deft., Twn. of Lockport motion for stay. Under the circumstances, it appears that it would be more appropriate for the application to be made to a Justice of the Supreme Ct.—Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz, Samuel Tavano & Victor Fuzak.

May 22, 1975, Filed Intervening Deft. affidavit in reply.

May 23, 1975, Filed Intervening deft. notice of motion to vacate judgment ret. 5-27-75.

May 23, 1975, Filed Intervening defts. memorandum of law in support of motion to vacate judgment.

May 27, 1975, Oral argument on motion to vacate judgment. adj. to 6-2-75 Submitted.

May 29, 1975, Filed Defts., Laverne Graf & Kenneth Comerford answering affidavit to pltfs.-intervenor's motion to vacate judgment of 1-9-75.

May 30, 1975, Filed Intervening Deft-Appellants supplemental affidavit.

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June 2, 1975, Filed affidavit of Pltf. Francis W. Shedd.

June 11, 1975, Filed order denying intervenor defts. motion to vacate the judgment of 1-9-75—Curtin, DJ Notice & copies to John J. Phelan, Louis J. Lefkowitz, Samuel Tavano & Victor Fuzak.

July 25, 1975, Filed transcript of proceedings of 5-19-75 & 6-2-75.

Sept. 2, 1975, Filed Pltfs. notice of motion for further injunctive relief etc. ret. 9-8-75.

Sept. 2, 1975, Filed Pltfs. notice of motion for an order & judgment is hereby re-noticed for 9-8-75.

Sept. 8, 1975, Pltfs. motion for an order & judgment in furtherance of the judgment of 1-9-75. Submitted.

Sept. 19, 1975, Filed letter to Judges Curtin, Burke & Timbers dated 9-12-75 from John Phelan.

Oct. 8, 1975, Oral argument on the question of mootness of the issues.

Oct. 8, 1975, Filed Pltfs. Notice of Motion to amend the amended complaint ret. 10/8/75.

Oct. 23, 1975, Filed Decision & Order of 3-Judge Ct. denying Pltfs'. motion to amend complaint, reinstating the judgment of this court of 1-9-75, amending the 1-9-75 judgment so that the 1974 Charter is in force and enjoining Intervening-Defts. from proceeding in the state court action—Timbers, CJ, Burke & Curtin, DJ (notice & copy to Moot, Sprague, Marcy, Landy & Fernbach, Messrs. Lefkowitz (Bflo.) and Tavano, and Hodgson, Russ, Andrews, Woods & Goodyear)

Nov. 6, 1975, Filed certified copy of Judgment of U.S. Supreme Court vacating judgment of District Court and re-

Relevant Docket Entries.

manding for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974.

Dec. 15, 1975, Filed Judgment reinstating judgment filed 1-9-75 & amending same to read that the 1974 County Charter, which supersedes the 1972 Charter, is in full force and effect; Town of Lockport is enjoined from proceeding further in a related action in state court and plaintiffs' motion to amend complaint is denied—Timbers, CJ, Burke & Curtin, DJ (notice & copy to Moot, Sprague, Marcy, Landy, Fernbach & Smythe, Messrs. Lefkowitz (Bflo) & Tavano and Hodgson, Russ, Andrews, Woods & Goodyear)

Dec. 18, 1975, Filed Intervening Defts'. Notice of Appeal to the Supreme Court.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on Plaintiffs.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on State of New York defendants.

Dec. 18, 1975, Filed Intervening Defts'. Affidavit of Service of notice of appeal on Niagara County defendants.

Dec. 22, 1975, Original papers filed subsequent to 5-2-75, exhibits, docket entries and Clerk's certificate mailed to Clerk, U.S. Supreme Court pursuant to request of Victor T. Fuzak, Esq. (papers transmitted for previous appeal still in Sup. Ct.)

Original Complaint (May 7, 1973).**UNITED STATES DISTRICT COURT**

Western District of New York

Francis W. Shedd, Individually and on Behalf
of All Others Similarly situated, *Plaintiffs,*

vs.

John P. Lomenzo, the Secretary of State
of the State of New York,

Arthur Levitt, Comptroller of the State
of New York,

LaVerne S. Graf, Clerk of the County Legislature,
County of Niagara, New York,

Kenneth Comerford, County Clerk, County
of Niagara, New York,

Defendants.

I

This is a civil action for a declaratory judgment and for injunctive relief authorized by Title 42, U.S.C., § 1983, 1988 to be commenced by a citizen of the United States or any other person within the jurisdiction thereof to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought to be redressed herein are those secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., § 1343(3).

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II

The action is for a declaratory judgment that a referendum held in the County of Niagara in the State of New York on November 7, 1972, upon the proposition (No. 5 on the ballot), to wit, "Shall Local law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved?", an abstract of which proposed charter is annexed to the within complaint and designated Exhibit A, must accord each voter in the county the full benefit of his vote within the geographic area of the county as a single unit as a fundamental right of equal suffrage protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the County of Niagara being a local government unit which exercises general governmental powers throughout the geographic area of the county of substantially equal effect upon the entire population of the county.

And further for a declaratory judgment that proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter (Exhibit A), which proposition was submitted to a vote of the electors of the entire geographic area of the County of Niagara, New York, in the general election in the year 1972, held on the 7th day of November, which proposition received 28,885 aye votes and 26,508 no votes in the entire geographic area of the County of Niagara by all qualified electors voting thereon, was duly adopted and entitled to force and effect in accordance with the rights, privileges and immunities secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

And further for a declaratory judgment that the provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New

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York, 35C McKinney's Cons. Laws of New York, § 33(7), that no form of local government or amendment thereof shall become effective unless approved in a referendum by a majority of the votes cast thereon in the area of the county outside of cities and in the cities of the county, if any, considered as one unit is an unconstitutional dilution and debasement of the right of the plaintiff and all members of the class to equal representation pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

And for a further judgment enjoining and directing John P. Lomenzo, the Secretary of State of the State of New York; Kenneth Commerford, County Clerk of the County of Niagara, New York and LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York to accept and to file the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, pursuant to § 27 of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 27, upon certification by the Clerk of the Niagara County Legislature that the aforesaid proposed county charter was approved by a majority of the total votes cast upon proposition No. 5 in the 1972 general election in the entire geographic area of Niagara County considered as one unit.

III

The plaintiff brings this action as a class action on behalf of the voters of the geographic area selected by the Niagara County Legislature which adopted proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, in which geographic area the referendum election was held as part of the general election in the year 1972 on November 7, thereof, whose vote is being diluted or debased by reason of the provisions of Article 9, § 1(h)(1) of the New

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York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which provide for two separate voting classes, to wit that no form of county government or amendment thereof, a local government unit exercising general governmental powers, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and by a separate majority of the votes cast in the cities of the county, if any, considered as one unit. Members of the class on behalf of whom the plaintiff sues are so numerous that joinder of all members is impracticable and the questions of law or fact common to the class, the claims or defenses of the parties, are typical of the claims or defenses of the class. Further, the plaintiff has such a personal stake in the outcome of the controversy and has been so personally involved in the efforts of certain residents of the County of Niagara to bring about the adoption of a charter form of local government that his representation on behalf of all the aggrieved voters within the geographic area, to wit the voters whose vote was diluted or debased by the classification of two voting units requiring two separate majorities, will insure that concrete adverseness which sharpens the presentation of issues upon which the court depends for recognition of difficult constitutional questions and will insure that the interests of the entire class will be fairly and adequately protected. That further, the refusal of The Honorable John P. Lomenzo, the Secretary of State of the State of New York, to accept the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, which refusal prevents the proposed local law from becoming operative, constitutes action in opposition to the class as a whole and the grounds of his action are generally applicable to the class thereby making suitable final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

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IV

The plaintiff at all times mentioned herein was a citizen of the United States and resided at 2620 Main Street in the City of Niagara Falls in the County of Niagara in the State of New York. That at all times mentioned herein he was a taxpayer of the United States of America, the State of New York, the County of Niagara and the City of Niagara Falls, That at all times mentioned herein he was a duly enrolled voter in the 3rd Election District of the 3rd Legislative District of the County of Niagara and did cast a vote from said election district of said legislative district in favor of proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, on the 7th day of November, 1972.

V

The defendants in the within action are John P. Lomenzo, the Secretary of State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk of the County of Niagara, New York, in whose offices the proposed local law must be filed pursuant to § 27 of the Municipal Home Rule Law of the State of New York in order to become operative. On December 8, 1972, the Secretary of State declined to accept the proposed Local Law No. 1 for filing by reason of the fact that the forwarding officer, to wit the Clerk of the Niagara County Legislature, had failed to certify that said proposed local law had been approved pursuant to § 33(7) of the Municipal Home Rule Law of the State of New York which provided that said proposed local law should not become operative unless and until it had received a majority of the votes in the area of the county outside the cities of said county and a

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separate majority in the area of the cities of said county considered as a separate unit.

VI

That in the aforesaid referendum election to determine whether or not a charter of local government, to be known as the Niagara County Charter, should be the governing instrument for the people of the geographic area, to wit Niagara County, and whether or not pursuant thereto the people of the geographic area of Niagara County should have the right to elect a Niagara County Executive and a Niagara County Comptroller, the votes cast in favor of such proposition totalled 28,885 and the votes cast in opposition to such proposition totalled 26,508. That for the purpose of clarity at this point, the votes cast in favor of the proposed local law in the following geographic area were as follows: within the three cities located within Niagara County—18,220; and in the areas outside of the cities of Niagara County—10,665 for a total of 28,885. That the votes cast in opposition to the proposed local law in the following areas were: within the three cities located within Niagara County—14,915; and in the areas outside of the cities of Niagara County—11,594 for a total of 26,508.

VII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1(h)(1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of Niagara, having general governmental powers over the entire

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geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government, to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformly and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County or in the areas outside of the cities within Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmental laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. By the terms of the proposed county charter, no function, facility, duty or power of any city, town, village

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or district is transferred, altered or impaired. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

VIII

The provisions of Article 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of this plaintiff and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

IX

The provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and

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other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement of the vote of the plaintiff and members of the class based upon the *prima facie* classification in units of voters by reason of their residence in the cities of the County or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but not consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.

X

Such deprivation of the rights, privileges and immunities secured by the Constitution of the United States are causing the plaintiff and members of his class serious and irreparable injury and harm for which there is no plain, adequate or com-

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plete remedy to redress such wrongs other than a suit for a declaratory judgment and injunctive relief.

XI

The application for a declaratory judgment and for injunctive relief herein restraining the enforcement, operation and execution of Art. 9, § 1(h)(1) of the New York State Constitution insofar as it provides for separate majorities of voters residing in the cities of a county and in the area outside the cities of a county upon a referendum election to establish a county charter government, a form of general purpose local government and restraining the enforcement, operation and execution of § 33(7) of the Municipal Home Rule Law of the State of New York 35C *McKinney's Cons. Laws of New York*, § 33(7), on the ground that such constitutional and statutory provisions violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution may not be granted unless it is heard and determined by a district court of three judges pursuant to Title 28, U.S.C. §§ 2281, 2284. The plaintiff does respectfully request that such a three-judge district court be convened in accordance therewith.

XII

The venue pursuant to Title 28, U.S.C., § 1391(b) is based upon the fact that this is a civil action in which the claim, to wit the denial of the fundamental right to equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment, arose in the judicial district within which the action is commenced.

WHEREFORE, the plaintiff respectfully prays on his own behalf and on behalf of all members of the class that judgment be granted in favor of the plaintiff in this action by a district court consisting of three judges pursuant to Title 28, U.S.C., §§ 2281, 2284,

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(a) declaring that in the referendum held in the County of Niagara in the 1972 general election on the 7th day of November, 1972, upon proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government be approved?", in which referendum proposition No. 5 received 28,885 votes in favor thereof and 26,508 votes in opposition thereto in the total geographic area of Niagara County as one voting unit, proposition No. 5 was duly adopted pursuant to the provisions of the Equal Protection Clause of the Fourteenth Amendment and is entitled to force and effect as the form of local government for the County of Niagara in accordance with the terms thereof; and

(b) declaring that the provisions of the New York State Constitution, Art. 9, § 1(h)(1) thereof and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C *McKinney's Cons. Laws of New York*, § 33(7), which require that the adoption or amendment of (1) a charter form or other alternative form of county government or (2) any such form of county government which transfers one or more functions or duties of the county or of the cities, towns, villages, districts or other units of local government wholly contained in such county to each other or (3) any such form of county government which abolishes offices, departments agencies or units of government shall not become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities and in the cities of the county, if any, considered as one unit, violate the Equal Protection Clause of the Fourteenth Amendment; and

(c) declaring that the alternative forms of county government provided by Art. 9, § 1(h)(1) of the New York State Constitution and by Article 4 of the Municipal Home Rule Law of

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the State of New York entitled, "The County Charter Law," 35C McKinney's Cons. Laws of New York, §§ 30-35, are forms of local government which provide general governmental services over an entire geographic area and in which no particular class of the population is specially interested or affected so as to warrant the exclusion of other persons from equal suffrage and, therefore, the approval or amendment of such alternative forms of county government on a referendum must be conducted in a single voting unit in order to accomplish the equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment; and

(d) enjoining and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this court to said effect; and

(e) directing that the election of a Niagara County Executive and a Niagara County Comptroller as provided in proposition No. 5 be held at the earliest available opportunity at a general election or a special election called therefor, upon the granting and entry of a final order and judgment in favor of the plaintiff in the within action, with the terms and conditions of such election to be settled at the time of the granting and entry of an order adjudging and determining the rights, privileges and immunities of the plaintiff and the members of the class as asserted in the within action to be secured by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

(f) awarding the plaintiff such further and different relief as may seem appropriate from the pleadings and proceedings in this action and which the court may deem just and proper and further awarding the plaintiff such costs, fees and dis-

Exhibit A Annexed to Original Complaint.

bursements as may be deemed appropriate for the prosecution of the within action.

MOOT, SPRAGUE, MARCY,
LANDY, FERNBACH &
SMYTHE,
Attorneys for the Plaintiff.

**Exhibit A to Original Complaint (Abstract
of 1972 Proposed Charter).**

NIAGARA COUNTY

**ABSTRACT OF PROPOSED CHARTER
FOR NIAGARA COUNTY**

FORM OF SUBMISSION OF PROPOSED CHARTER

NIAGARA COUNTY SEAL

Adopted September 6, 1972, by the Niagara County
Legislature subject to approval by Referendum
November 7, 1972.

**ARTICLE I—NIAGARA COUNTY AND ITS GOVERN-
MENT**

Charter constitutes form of government for Niagara County. Purposes include "The separation of county legislative and executive functions; the securing of all possible county home rule; and the accomplishment of greater efficiency and responsibility in county government."

Exhibit A Annexed to Original Complaint.

Within limits prescribed by the County Law, Charter supercedes inconsistent provisions of other laws.

ARTICLE II—LEGISLATIVE BRANCH

County Legislature continues as "the legislative, appropriating, governing and policy determining body of the county" with no change in numbers. The term of office of the members shall be four years. Local laws and ordinances are subject to veto by the County Executive; veto may be overridden by $\frac{2}{3}$ vote.

Sums of money appropriated by any one or more items, or parts of items, or parts of items in any law or resolution appropriating money for the use of the county government or any agency or commission, are subject to veto by the County Executive; veto may be overridden by a majority vote.

ARTICLE III—EXECUTIVE BRANCH

There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. He shall hold no other public office except as otherwise herein provided; shall give his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. His term of office shall begin with the first day of January, 1974, next following his election and shall be for four years. County Executive is chief executive and administrative head of county government. Provision is made for removal and designation of Acting County Executive. In the office of County Executive, there are six divisions: Budget, Purchase, Central Services, Research, Traffic Safety and Advisory Board, and Recreation and Related Programs, appointment of these Executive Division heads is also subject to confirmation.

*Exhibit A Annexed to Original Complaint.***ARTICLE IV—DEPARTMENT OF AUDIT AND CONTROL**

There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office.

The Comptroller shall have all the powers and perform all the duties conferred or imposed upon a county comptroller under the county law.

ARTICLE V—DEPARTMENT OF FINANCE

Commencing the first day of January, 1974, there shall be a department of finance headed by a commissioner. He shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office, by the County Executive subject to confirmation by the County Legislature and shall serve at the pleasure of the County Executive. The elective office of county treasurer shall be abolished as of January 1, 1974.

ARTICLE VI—DEPARTMENT OF ASSESSMENT

There shall be a department of assessment, the head of which shall be the director of real property tax services, who shall be appointed on the basis of his qualifications for the

Exhibit A Annexed to Original Complaint.

duties of the office. Such director shall be appointed by the County Executive, subject to confirmation by the County Legislature for a six year term.

ARTICLE VII—FINANCIAL PROCEDURES

The County Executive shall submit to the clerk of the county legislature, on or before the 5th day of October of each year, for consideration by such legislature, a proposed budget for the ensuing fiscal year, and a capital program for the next six fiscal years.

ARTICLE VIII—DEPARTMENT OF PUBLIC WORKS

There shall be a department of public works, the head of which shall be the commissioner of public works, who shall be appointed on the basis of his experience and qualifications for the duties of the office. Such commissioner shall be appointed by and serve at the pleasure of the County Executive, subject to confirmation of the County Legislature. Upon the effective date of this charter, the county department of highways, the parks department and the department of engineering, if any, shall be divisions of the department of public works.

ARTICLE IX—BOARD OF ACQUISITION AND CONTRACT

There shall be a board of acquisition and contract which shall consist of the County Executive, Commissioner of Public works, and the Chairman of the County Legislature. The Board of Acquisition and Contract shall contract for and acquire by purchase or condemnation, all lands, buildings and other real property, the acquisition of which has been authorized by the County Legislature, and shall award all contracts for the construction, reconstruction, repair or alterations of all public works or improvements.

*Exhibit A Annexed to Original Complaint.***ARTICLE X—PUBLIC DEFENDER**

There shall be a Public Defender who shall be appointed by the County Legislature and whose term of office shall be for four years. He shall be duly admitted to the practice of law in the State of New York and a resident of the County of Niagara.

ARTICLE XI—DEPARTMENT OF SOCIAL SERVICES

There shall be a department of social services headed by a commissioner who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive, subject to confirmation by the County Legislature, except that the person serving as commissioner of public welfare at the time immediately prior to this charter taking effect, shall continue to serve as the Commissioner of the Department of Social Services until December 31, 1976, and thereafter the commissioner of the Department of Social Services shall be appointed as provided pursuant to Section 116 of the Social Welfare Law of the State of New York.

ARTICLE XII—DEPARTMENT OF HEALTH

There shall continue to be a department of health headed by a commissioner of health who shall be appointed by the Health Board. The Commissioner of health shall be a physical duly licensed to practice medicine in the State of New York, shall be experienced in public health administration and shall possess such qualifications as are prescribed in the state sanitary code or otherwise by the public health council of the State of New York.

*Exhibit A Annexed to Original Complaint.***ARTICLE XIII—DEPARTMENT OF MENTAL HEALTH**

There shall continue to be a department of mental health headed by a director who shall be appointed by the Mental Health Board, qualified according to the standards fixed by the State Commissioner of Mental Hygiene, in accordance with the provisions of Article 8(a) of the Mental Hygiene Law.

ARTICLE XIV—DEPARTMENT OF ECONOMIC DEVELOPMENT & PLANNING

There shall continue to be a Niagara County Planning Board as provided by Article 12(b) of the General Municipal Law and shall be known as the Niagara County Planning Board, members of which shall be appointed by the Chairman of the County Legislature.

ARTICLE XV—DEPARTMENT OF PERSONNEL

The Niagara County Civil Service Commission is continued for the purpose of administering Civil Service Law for Niagara County. There shall be a department of personnel headed by a director who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive subject to confirmation by the County Legislature.

ARTICLE XVI—DEPARTMENT OF LAW

There shall be a department of law headed by the County Attorney, who shall be appointed by, and whose term shall be the same as the County Legislature. He shall be duly admitted to the practice of law in the State of New York and a resident of the County of Niagara.

*Exhibit A Annexed to Original Complaint.***ARTICLE XVII—DEPARTMENT OF RECORDS**

There shall be a department of records headed by a County Clerk who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1973, at which a county clerk shall be elected for a three year term to commence on January 1, 1974, and every county clerk elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XVIII—DISTRICT ATTORNEY

There shall be a district attorney who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1972, at which a district attorney shall be elected for a three year term to commence on January 1, 1973, and every district attorney elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, and duly admitted to the practice of law in the State of New York. He shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XIX—SHERIFF

There shall be a sheriff who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his

Exhibit A Annexed to Original Complaint.

election, except that the provisions of this section with respect to such election shall not take effect until the general election of 1973, at which a sheriff shall be elected for a three year term to commence on January 1, 1974, and every sheriff elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

ARTICLE XX—MEDICAL EXAMINER

The County Legislature shall have the power by local law, to abolish the office of coroner and create the office of appointive medical examiner. Such local law shall not be subject to mandatory referendum, but must be adopted and filed in the office of the Secretary of the State of New York at least 150 days prior to any general election. The terms of office of all coroners elected or appointed and holding office in the county at the time such local law is adopted and filed as hereinbefore provided, shall expire on the December 31st following the adoption of such local law, and at the general election to be held in such year and thereafter no coroner shall be elected and Article XX of this charter and applicable provisions of the code shall become and be effective on and after January 1, next succeeding.

ARTICLE XXI—OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS AND FUNCTIONS

The Board of Elections, its powers and duties and the method of appointment of the members thereof by the County Legislature shall continue as provided by law. There shall be an office of probation headed by a probation director who shall be appointed in the manner provided by Section 938-b of the Code of Criminal Procedure of the State of New York, and shall have such powers and duties as are provided by law.

Exhibit A Annexed to Original Complaint.

The Board of Managers of Mount View Hospital, its powers and duties and the method of appointment of the members thereof shall continue as provided by law. The board of trustees of the Niagara County Community College, the Alcoholic Beverage Control Board, the Fire Advisory Board, and the Industrial Development Agency shall continue as provided by law. The appointment of any head, board or agency in relation to a county sewer, water, drainage or watershed protection district, if any, or to any other county district of a similar nature, shall be by the County Legislature. The Fire Coordinator shall be appointed by the County Legislature upon recommendation of the Fire Advisory Board. Subject to confirmation by the County Legislature, and except as otherwise provided in this charter and code, the County Executive shall appoint the head of any other or additional administrative unit of the county including among others, the director of civil defense, director of veteran's service, county historian, sealer of weights and measures. Except as otherwise provided in this charter or code, other appointments to boards and like units shall be made by the county executive subject to confirmation of the county legislature. The administrator of the Workmen's Compensation however, shall continue to be appointed as now provided by local law and the laws of the State of New York applicable thereto. Administrative functions not otherwise assigned by this charter or code shall be assigned by the county executive to an administrative unit.

ARTICLE XXII—SERVICE RELATIONSHIPS

No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code. The County of Niagara shall have power to contract with any public corporation including but not limited to a

Exhibit A Annexed to Original Complaint.

municipal, district or public benefit corporation as defined in Section 3 of the General Corporation Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services relating thereto shall be borne proportionately by each such contracting party as agreed upon.

ARTICLE XXIII—GENERAL PROVISIONS

The board of trustees of the Niagara County Community College shall have such powers and only such powers as those specified in the Education Law of the State of New York. Except as otherwise provided in this charter or code, every other board, the members of which are appointed, shall be an advisory board consisting of such members, and the members thereof shall be appointed for such terms as are or may be provided in this charter or the code. Wherever provision is made in this charter or code for the appointment of an advisory board, the members so appointed, unless otherwise provided, shall serve at the pleasure of the appointing authority. Except as otherwise provided in this charter or code, every contract to which the county is a party shall require approval by the County Legislature, if said contract is for (a) the sale or purchase of real property; (b) the erection, alteration or demolition of a building or other structure; (c) the providing of facilities or the rendering of services by, for or with any other public corporation. All such contracts shall be executed by the county executive, except as otherwise provided in this charter or the code. The civil service status and rights of county employees shall not be affected by this charter or code. A vacancy, otherwise than by expiration of

Exhibit A Annexed to Original Complaint.

term in any elective county office including but not limited to the office of comptroller, county clerk, district attorney or sheriff shall be filled in accordance with Section 400 (7) of the County Law. The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election a comptroller, county clerk, district attorney or sheriff, as the case may be, shall be elected for the balance of the term, if any.

A vacancy, otherwise than by expiration of term in the office of County Executive, shall be filled by appointment by the County Legislature of a qualified elector of the county, having the same political affiliation as the person last elected to such office. The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which time a county executive shall be appointed for the balance of the unexpired term, if any. Except as otherwise provided in this charter or code, a vacancy in the office of the head of any administrative unit, the head of which by virtue of this charter the county executive shall have the power to appoint or remove, shall be filled by a person who shall be appointed on the basis of his administrative experience and his qualifications for the duties of such office by the county executive subject to confirmation by the county legislature where provided. Except as otherwise provided in this charter or code, the head of any administrative unit shall have the power to fill vacancies occurring within such administrative unit pursuant to the civil service law.

*Exhibit A Annexed to Original Complaint.***ARTICLE XXIV—APPLICATION OF CHARTER**

This charter shall become and be effective on and after January 1, 1973, upon approval by public referendum in the manner provided by law. The administrative code may be adopted and amended by local law at any time subsequent to the approval and adoption of this charter. The first county executive shall be elected at the general election in 1973, and shall take office on January 1, 1974. The comptroller shall be first elected at the general election in 1973 and the person then elected shall, upon qualifying, take office on January 1, 1974 for a four year term, and every comptroller elected thereafter shall have a term of four years. Pending election and qualifying for office, the incumbent county treasurer, county clerk, district attorney and sheriff shall have the powers and perform the duties prescribed in this charter and code for the elective office of comptroller, county clerk, district attorney and sheriff respectively. The terms of office for the county executive and comptroller shall be for four years except as otherwise provided in this charter. The terms of office for the county clerk, district attorney and sheriff shall be three years except as otherwise provided in this charter. This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office, change an elective office to appointive or an appointive office to elective or change the powers of an elective county officer shall be subject to mandatory referendum. No local law which would abolish or change an administrative unit prescribed in this charter or the power of an appointive county officer in the executive branch shall be enacted before January 1, 1973.

Exhibit A Annexed to Original Complaint.

Provision is made for continuity of authority (transition under Charter), continuing validity of prior obligations (bonds already issued, etc.), separability (in case of adjudication) and liberal construction to effectuate charter objectives and purposes.

Local Law No. 1 of 1972 adopted by the Niagara County Legislature on September 6, 1972. Abstract prepared by LaVerne S. Graf, Clerk of the Niagara County Legislature with advice of Samuel L. Tavano, County Attorney, pursuant to Section 33, subdivision 8 of the Municipal Home Rule Law, State of New York.

FORM OF PROPOSITION TO BE VOTED ON

Proposition for the adoption of a County Charter for the County of Niagara, State of New York, in accordance with the provisions of Article 4 of the Municipal Home Rule Law of the State of New York.

Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government **BE APPROVED?**

We hereby certify that the foregoing Text of the Proposed Niagara County Local Law, in relation to the adoption of a County Charter for the County of Niagara, State of New York, in accordance with the provisions of Article Four of the Municipal Home Rule Law, otherwise referred to as the County Charter Law of the State of New York, are correct copies of the originals on file with the Board of Elections.

Given under our Hand and Official Seal of the Office of the Board of Elections of the County of Niagara of the State of New York, at the City of Lockport, this eighth day of Sep-

Exhibit A Annexed to Original Complaint.

tember, in the year One Thousand Nine Hundred and Seventy-two.

COUNTY OF NIAGARA,
BOARD OF ELECTIONS,
STATE OF NEW YORK:

PERRY CHAMBERS,
Commissioner.

NORTON F. AURIGEMA,
Commissioner.

Comprising the Board of Elections
of the County of Niagara, New York.

Exhibit B to Original Complaint (Population of Counties, 1970).

The population figures of the following chart are compiled from statistics contained in the New York Legislative Manual, 1971-72 entitled "Population of Counties According to the Enumerations of 1970," at Page 1255:

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Albany	146,838	139,904	286,742	24.39%
Allegany	None	46,548	46,548	(not applicable)
Broome	64,123	157,692	221,815	14.45%
Cattaraugus	27,046	54,620	81,666	16.56%
Cayuga	34,599	42,840	77,439	22.34%
Chautauque	56,650	90,655	147,305	19.22%
Chemung	39,945	61,592	101,537	19.67%
Chenango	8,843	37,525	46,368	09.53%
Clinton	18,715	54,219	72,934	12.83%
Columbia	8,940	42,579	51,519	08.67%
Cortland	19,621	26,273	45,894	21.37%
Delaware	None	44,718	44,718	(not applicable)
Dutchess	45,284	177,011	222,295	10.18%
Erie	513,323	600,168	1,113,491	23.09%
Essex	None	34,631	34,631	(not applicable)
Franklin	None	43,931	43,931	(not applicable)

BEST COPY AVAILABLE

**Exhibit B to Original Complaint (Population
of Counties, 1970).**

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Pulton	29,722	22,915	52,637	21.76%
Genesee	17,338	41,384	58,722	14.76%
Greene	None	33,136	33,136	(not applicable)
Hamilton	None	4,714	4,714	(not applicable)
Herkimer	7,629	60,004	67,633	05.64%
Jefferson	30,787	57,721	88,508	17.39%
Lewis	None	23,644	23,644	(not applicable)
Livingston	None	54,041	54,041	(not applicable)
Madison	11,658	51,206	62,864	09.27%
Monroe	295,011	416,906	711,917	20.71%
Montgomery	25,524	30,359	55,883	22.83%
Nassau	58,897	1,369,941	1,428,838	02.06%
Niagara	147,026	88,694	235,720	18.81%
Oneida	141,759	131,278	273,037	24.04%
Onondaga	197,297	275,538	472,835	20.86%
Ontario	27,281	51,568	78,849	17.30%
Orange	57,678	163,979	221,657	13.01%
Orleans	None	37,305	37,305	(not applicable)
Oswego	34,916	65,981	100,807	17.31%
Otsego	16,030	40,151	56,181	14.26%
Putnam	None	56,696	56,696	(not applicable)
Rensselaer	10,136	142,374	152,510	03.32%
Rockland	None	229,903	229,903	(not applicable)
St. Lawrence	14,554	97,437	111,991	06.49%

**Exhibit B to Original Complaint (Population
of Counties, 1970).**

County	Population of the Cities as a Unit Within the Geographic Area of the County	Population of Area Outside the Cities Within the Geographic Area of the County	Total County	Percentage of Vote With Power to Prevent Approval of Proposition
Saratoga	25,092	96,672	121,764	10.30%
Schenectady	77,958	83,120	161,078	24.19%
Schoharie	None	24,750	24,750	(not applicable)
Schuyler	None	16,737	16,737	(not applicable)
Seneca	None	35,083	35,083	(not applicable)
Steuben	27,936	71,610	99,546	14.03%
Suffolk	None	1,127,030	1,127,030	(not applicable)
Sullivan	None	52,580	52,580	(not applicable)
Tioga	None	46,513	46,513	(not applicable)
Tompkins	26,226	50,828	77,064	17.01%
Ulster	25,544	115,697	141,241	09.04%
Warren	17,222	32,180	49,402	17.43%
Washington	None	52,725	52,725	(not applicable)
Wayne	None	79,404	79,404	(not applicable)
Westchester	422,089	472,317	894,406	23.59%
Wyoming	None	37,688	37,688	(not applicable)
Yates	None	19,831	19,831	(not applicable)

**Answer of Defendant Niagara County Officials
to Original Complaint (May 25, 1973).**

(Original Title.)

The Defendants, LaVerne S. Graf, and Kenneth Comerford, for their answer to the Plaintiff's complaint allege as follows:

1. Upon information and belief admits the allegations of Paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11.

2. Denies Paragraph 5.

3. Denies each and every allegation not heretofore admitted, denied, or otherwise controverted.

For an affirmative defense to the complaint of the plaintiff, defendant alleges as follows:

4. On the 3rd day of April, 1973, the Federal District Court of the Western District of New York entered a decision and judgment in an action between the County of Niagara and the State of New York in which the County of Niagara was Plaintiff and alleged the same constitutional claim as is raised by the plaintiffs in this action.

5. The Court's decision in that action was that there was no substantial Federal question presented by the County of Niagara claim. Attached hereto and made a part hereof, is the Decision and Judgment marked Exhibit "A".

6. As a result of this decision, the plaintiffs in this action are now barred and collaterally estopped from raising the same issue again against the same defendants or their agents, servants, or employees.

WHEREFORE, the defendants, LaVerne S. Graf, and Kenneth Comerford, request the Court to dismiss the action of the plaintiff on the grounds that no substantial Federal question exists, and for such other and further relief as the

*Exhibit A Attached to Answer.
Plaintiffs' Notice of Motion to Strike Affirmative
Defense of Collateral Estoppel (July 9, 1973).*

Court may deem proper, together with the cost and disbursement of this action.

SAMUEL L. TAVANO,
Niagara County Attorney,
Attorney for Defendants, LaVerne
S. Graf & Kenneth Commerford.

(Exhibit A to Answer, Henderson, D. J. Decision in *County of Niagara v. State of New York*, Civ. 1972—656 reproduced *infra* at pp. 178-182).

**Plaintiffs' Notice of Motion to Strike Affirmative
Defense of Collateral Estoppel (July 9, 1973).**

(Original Title.)

PLEASE TAKE NOTICE that the undersigned will move this Court at a Term thereof to be held by the Honorable John T. Curtin, U.S.D.J., on the 12th day of July, 1973, at 10:00 A.M. on that date or as soon thereafter as counsel can be heard, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, for an order striking the affirmative defense of collateral estoppel pleaded in paragraphs numbered "4," "5" and "6" of the answer of the defendants, LaVerne S. Graf, Clerk of the County Legislature, Town of Niagara, and Kenneth Comerford, County Clerk, Town of Niagara, on the ground that said defense is insufficient as a matter of law and for such other and further relief as the court may deem just and proper in the premises.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH AND SMYTHE.

**Affidavit in Support of Plaintiffs' Motion to
Strike Affirmative Defense of Collateral
Estoppel (August 3, 1973).**

(Original Title.)

JOHN J. PHELAN, being duly sworn, deposes and says:

1. That he is an attorney at law, duly admitted to practice in the United States District Court for the Western District of New York and is counsel for the plaintiffs in the above-entitled action.

2. This affidavit is submitted to the court in opposition to the defense of collateral estoppel raised by the defendants. The defendants Lomenzo and Levitt raise the issue in a motion to dismiss the above-entitled action on the ground, among others, that the plaintiff is barred and collaterally estopped from raising the issues in the above-entitled action. The defendants Graf and Comerford raise the issue as an affirmative defense in their answer and an appropriate motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure has been made by the plaintiff Shedd to strike from the answer of the defendants Graf and Comerford paragraphs "4", "5" and "6" of their answer wherein is contained such affirmative defense, the affirmative defense of collateral estoppel.

3. The alleged basis for the defense of collateral estoppel is that the action entitled, *County of Niagara, New York vs. State of New York* in this court, which was finally dismissed on May 4, 1973, is a bar to this action.

4. In order for collateral estoppel to be a defense and a bar to a subsequent action, the subsequent action must be between the same parties or their privies.

The previous action, the action by the *County of Niagara* was not instituted as a class action pursuant to Rule 23 nor did such plaintiff have any of the qualities of adverseness to

**Affidavit in Support of Plaintiffs' Motion to Strike
Affirmative Defense of Collateral Estoppel
(August 3, 1973).**

sharpen the presentation of the issues nor the capacity or desire to represent the interests of the class of aggrieved voters, all of which your deponent will develop shortly. Under no circumstances, your deponent contends, could such action ever be considered a class action and therefore there is no sameness of party which would fulfill the first requirement of the defense of collateral estoppel.

5. A second question is whether or not there was any basis for a claim by any of these four defendants of privity between the plaintiff in this action and the plaintiff in the previous action in this court entitled *County of Niagara, New York vs. State of New York*, i.e. whether there is a factual evidence that in the previous action the plaintiff adequately represented or protected the interests of, or afforded due process to the voters of Niagara County who are aggrieved by the fact that their vote in favor of the proposition for the adoption of a Niagara County Charter was debased and diluted unconstitutionally. The factual record is to the contrary. On the one occasion in which the Niagara County Legislature was requested to act at the request of the plaintiff Francis W. Shedd, an aggrieved voter who spoke for the class of aggrieved voters, the Niagara County Legislature refused to represent such voters and rejected the request that the issue of the deprivation of their constitutional rights continue to be litigated.

6. The fact that the aforesaid aggrieved voters were not represented or given their day in court in the previous action is clearly demonstrated by the events that occurred on May 4, 1973 involving whether or not the Niagara County Legislature would authorize and direct the Niagara County Attorney to file a notice of appeal from the determination of this court in

*Affidavit in Support of Plaintiffs' Motion to Strike
Affirmative Defense of Collateral Estoppel
(August 3, 1973).*

the action entitled *County of Niagara, New York vs. State of New York* so that a true class action pursuant to Rule 23 could be joined with said action and the substantive constitutional issue adequately and properly presented.

7. In other words, the issue of whether or not the Niagara County Legislature and the Niagara County Attorney were willing and prepared to represent the aggrieved voters was presented to that body before the order dismissing the action entitled *County of Niagara, New York vs. State of New York* was final and upon information and belief the Niagara County Legislature rejected the request of the plaintiff in this action that a notice of appeal from the order of dismissal in the previous action be filed and served so that no claim could ever be made that the previous action commenced by the Niagara County Attorney was dispositive of the substantial federal constitutional questions raised in this action.

8. This affidavit is made by your deponent as attorney for the plaintiff Francis Shedd upon information and belief where stated because of the fact that the plaintiff Francis W. Shedd is out of the state and to the best of your deponent's knowledge is on the Pacific Coast and unavailable to execute an affidavit. Upon information and belief, at the recommendation of your deponent, the plaintiff Francis W. Shedd appeared before the Niagara County Legislature at a meeting thereof held on May 4, 1973, advised the Niagara County Legislature that he was a voter of the City of Niagara Falls, that he had voted in favor of the proposition for the adoption of the Niagara County Charter, that it was his contention that he was an aggrieved voter who had been deprived of his right of equal suffrage guaranteed by the Fourteenth Amendment of the United States Constitution, that he intended to com-

*Affidavit in Support of Plaintiffs' Motion to Strike
Affirmative Defense of Collateral Estoppel
(August 3, 1973).*

mence a class action for a declaratory judgment and a determination of whether his constitutional right to equal protection pursuant to the Fourteenth Amendment had been violated, that he intended to commence an action in the United States District Court for the Western District of New York on the 4th day of May, 1973 or at the earliest date and he requested and urged the Niagara County Legislature not to permit the order granted by the Honorable John O. Henderson on April 4, 1973 to become final and further requested the Niagara County Legislature to direct its county attorney to file a notice of appeal so that whatever legal effect might result from an order of dismissal which became final in the previous action might be avoided despite the fact that the previous action was not in the nature of a class action, that in the previous action the aggrieved voters were not represented nor was the necessary foundation laid pursuant to Rule 23 of the Federal Rules of Civil Procedure, nor was said action a true class action which would have any effect upon the class action of which Mr. Shedd advised the Niagara County Legislature he contemplated commencing forthwith.

9. Your deponent was advised by Mr. Shedd that the Niagara County Legislature had rejected the request of Mr. Shedd and directed its county attorney not to file notice of appeal. In other words, such Legislature specifically declined to represent the interests of the aggrieved voters of Niagara County who had supported the proposition for a Niagara County Charter at a time when the previous action entitled *County of Niagara, New York vs. State of New York* had not been finally dismissed. The contention by the attorneys for the defendants under said circumstances that the principle of collateral estoppel applies in this action in bar of the cause of

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action alleged by the aggrieved voters of Niagara County is totally without merit.

10. Further, the substantial federal constitutional question pleaded in the within action was not pleaded in the previous action nor were the relevant issues and decisions briefed or advocated in the previous action. The substantial federal constitutional question is as follows:

"A local government having general governmental powers which substantially affects all the citizens equally throughout the entire geographic area served by the body may not create separate voting units based upon race, sex, economic ability or location of residence."

The constitutional principal of equal suffrage is guaranteed by the Equal Protection Clause of the Fourteenth Amendment in local government elections has been defined and redefined in a series of cases commencing with *Avery vs. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114 (1968) and continuing through *Cipriano vs. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969), *Kramer vs. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969), *Hadley vs. Junior College District*, 397 U.S. 50, 90 S.Ct. 791 (1970), *Dusch vs. Davis*, 387 U.S. 112, 115, 87 S.Ct. 1554, 1555 (1967) and *Sayler Land Company vs. Tulare Lake Basin Water Storage District*, 93 S.Ct. 1224, decided on March 20, 1973.

This is the substantial federal constitutional issue which pertains to the fundamental constitutional rights of the class of citizens represented by the writer in the within action. That substantial federal constitutional issue was not an issue in the previous *County of Niagara, New York vs. State of New York* action, was not pleaded, briefed or advocated before the

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Senior Judge of this district. The only vague reference to the violation of the right to equal suffrage, as a constitutional right protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, is contained in paragraph "24" in the *County of Niagara, New York vs. State of New York* action in which paragraph the issue is not properly presented. The pleader in the complaint in that action alleged only that the issue in the action involved the question that the majority vote should prevail. The fact is that the issue involves much more than majority rule. It involves the deprivation of fundamental rights by fencing people in or fencing them out, depending upon your perspective, based upon race, sex, economic ability and location of residence.

10. The writer respectfully submits that the motion to dismiss the complaint made by the Attorney General of the State of New York on behalf of the defendants Lomenzo and Levitt should be denied in its entirety, that the motion of the plaintiff to strike the affirmative defense of collateral estoppel in the answer of the defendants Graf and Comerford should be granted and further

That a three-judge district court to hear and determine the constitutional issues set forth in this action as required by Title 28, U.S.C. §§ 2281, 2284 should be convened at the earliest opportunity.

JOHN J. PHELAN.

(Sworn to August 3, 1973).

**Amended Complaint
(Nov. 5, 1973).**

UNITED STATES DISTRICT COURT
Western District of New York

CITIZENS FOR ACTION AT THE LOCAL LEVEL, INC.
(CALL) and FRANCIS W. SHEDD, Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN P. LOMENZO, the Secretary of State of the State of
New York, ARTHUR LEVITT, Comptroller of the State of
New York, LaVERNE S. GRAF, Clerk of the County
Legislature, County of Niagara, New York, KENNETH
COMERFORD, County Clerk, County of Niagara, New
York,

Defendants.

Civil Action
No. 1973-222

I

This is a civil action for a declaratory judgment and for injunctive relief authorized by Title 42, U.S.C., § 1983, 1988 to be commenced by a citizen of the United States or any other person within the jurisdiction thereof to redress the deprivation under color of law of rights, privileges and im-

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munities secured by the Constitution and Laws of the United States. The rights, privileges and immunities sought to be redressed herein are those secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., § 1343(3).

II

The action is for a declaratory judgment that a referendum held in the County of Niagara in the State of New York on November 7, 1972, upon the proposition (No. 5 on the ballot), to wit, "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved?", an abstract of which proposed charter is annexed to the within complaint and designated Exhibit A, must accord each voter in the county the full benefit of his vote within the geographic area of the county as a single unit as a fundamental right of equal suffrage protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the County of Niagara being a local government unit which exercises general governmental powers throughout the geographic area of the county of substantially equal effect upon the entire population of the county.

And further for a declaratory judgment that proposition No. 5, a proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter (Exhibit A), which proposition was submitted to a vote of the electors of the entire geographic area of the County of Niagara, New York, in the general election in the year 1972, held on the 7th day of November, which proposition received 28,885 aye votes and 26,508 no votes in the entire geographic area of the County of Niagara by all qualified electors voting thereon, was duly

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adopted and entitled to force and effect in accordance with the rights, privileges and immunities secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

And further for a declaratory judgment that the provisions of Art. 9, § 1(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), that no form of local government or amendment thereof shall become effective unless approved in a referendum by a majority of the votes cast thereon in the area of the county outside of cities and in the cities of the county, if any, considered as one unit is an unconstitutional dilution and debasement of the right of the plaintiff and all members of the class to equal representation pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

And for a further judgment enjoining and directing John P. Lomenzo, the Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; Kenneth Comerford, County Clerk of the County of Niagara, New York and LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York to accept and to file the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, pursuant to § 27 of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Law of New York, § 27, upon the certification by the Clerk of the Niagara County Legislature that the aforesaid proposed county charter was approved by a majority of the total votes cast upon proposition No. 5 in the 1972 general election in the entire geographic area of Niagara County considered as one unit.

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III

The plaintiff Citizens for Action at the Local Level, Inc. (CALL) is a membership corporation formed pursuant to the Membership Corporation Law of the State of New York on May 15, 1971 with its principal place of business in the City of Lockport, County of Niagara, State of New York. The territory in which its operations are principally conducted is Niagara County, New York. The purpose of the corporation is to promote the social welfare of the citizens of Niagara County through the improvement of local government, to make local governments more accountable to the people; to make local government more responsive to the needs and desires of the people; to make local government more effective and efficient in their functional operations and in their response to State, Federal and regional governments.

Membership in Citizens for Action at the Local Level, Inc. (CALL) is open to all residents of Niagara County. The membership consists of persons engaged in government, in industry, in labor organizations, in education, in communications, in social and community action and includes representatives of every race, sex, color and religion.

The plaintiff Citizens for Action at the Local Level, Inc. (CALL) has a special interest in and played a leadership role in the advancement of the proposition for a Niagara County Charter. The activities of the plaintiff Citizens for Action at the Local Level, Inc. (CALL) consisted of preparing and publicizing a proposed county charter document, organizing and conducting a series of public meetings throughout Niagara County to inform the citizens regarding said county charter, to apprise the citizens of Niagara County with the necessity for an alteration or amendment of the forms and functions of the units of local government in Niagara County,

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and to stimulate public support in the cities of Niagara County and in the area outside the cities of Niagara County for the adoption of a county charter form of local government.

The plaintiff corporation submitted the county charter which it had prepared and publicized to the Niagara County Legislature, participated in a series of meetings with the members of the Niagara County Legislature for the purpose of obtaining legislative approval of a proposed county charter for submission to the electorate of Niagara County and as a result of the special interest of the plaintiff Citizens for Action at the Local Level, Inc. (CALL) and its leadership role, the Niagara County Legislature adopted a local law on September 6, 1972, a county charter for Niagara County, subject to approval by referendum on November 7, 1972.

Thereafter, from September 6, 1972 until the date of the referendum, the plaintiff corporation and its members conducted an extensive publicity campaign throughout Niagara County to secure adoption of said Local Law No. 1 of 1972, urged voters in the cities and in the area outside the cities to exercise their voting franchise in the referendum election and was the leading advocate for the approval of Proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of government be approved," all of which demonstrates the special interest of the plaintiff corporation in the alteration and amendment of the forms and functions of local government within Niagara County.

Further, the mission of the plaintiff corporation to promote the social welfare of the citizens of Niagara County through the improvement of local government; to make local government more accountable and responsive to the needs and desires of the people and more effective and efficient in their

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functional operations has continued unabated since that time and will continue in the foreseeable future.

The board of directors of the plaintiff corporation has duly resolved to seek a judicial determination that the constitutional rights of all citizens of Niagara County, to equal suffrage pursuant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, whatever their race, their economic status or their place of residence in their vote upon the proposition for the adoption of a county charter form of local government may not be debased or diluted which is the effect of the separate units of voters in the cities and in the area outside of the cities as provided in Art. 9, § 1 (h) (1) of the New York State Constitution.

Further the members of the plaintiff corporation are among the members of the class of aggrieved voters who have heretofore commenced the within action for a declaratory judgment that Art. 9, § 1 (h) (1) of the New York State Constitution is unconstitutional in violation of the right of equal suffrage guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The plaintiff corporation Citizens for Action at the Local Level, Inc. (CALL) is composed of members who are residents of Niagara County who have a special interest in the improvement of local government in Niagara County. That said corporation and the members thereof have a united interest as individuals and as members of said corporation which interest has been affected adversely by the dilution and debasement of the right of equal suffrage of all the voters of Niagara County because of the application of the Art. 9, § 1 (h) (1) of the New York State Constitution to the result of the vote upon proposition No. 5 for the adoption of a county charter form of local government in Niagara County. The adverse effect upon the plaintiff corporation and its members

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jointly and individually is that the people of Niagara County have been deprived of the social, governmental and economic benefits that would result from the adoption of a county charter form of government. The debasement and dilution of the right of equal suffrage affects the plaintiff corporation through its members and its members individually in their daily activities and their rights and privileges as citizens and in their opportunity to achieve social justice for the citizens of Niagara County through the improvement of local government. The injury in fact suffered by the plaintiff Citizens for Action at the Local Level, Inc. (CALL) and the significant and direct injury suffered by its members in addition thereto, consists of the deprivation of (1) local government which is more accountable to the people of Niagara County, including the members of plaintiff corporation; (2) local government which is more responsive to the needs and desires of the people of Niagara County, including the members of plaintiff corporation, and (3) local government which is more effective and efficient in their functional operations on behalf of the people of Niagara County, including the members of plaintiff corporation.

IV

The plaintiff Francis W. Shedd at all times mentioned herein was a citizen of the United States and resided at 2620 Main Street in the City of Niagara Falls in the County of Niagara in the State of New York. That at all times mentioned herein he was a taxpayer of the United States of America, the State of New York, the County of Niagara and the City of Niagara Falls. That at all times mentioned herein he was a duly enrolled voter in the 3rd Election District of the 3rd Legislative District of the County of Niagara and did cast a vote from said election district of said legislative district in favor of proposition No. 5, a proposed Local Law No. 1,

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1972, in relation to the adoption of a Niagara County Charter, on the 7th day of November, 1972.

V

The plaintiffs bring this action on behalf of the voters of the geographic area selected by the Niagara County Legislature which adopted proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, in which geographic area and referendum election was held as part of the general election in the year 1972 on November 7, thereof, whose vote is being diluted or debased by reason of the provisions of Art. 9, § 1 (h) (1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which provide for two separate voting classes, to wit that no form of county government or amendment thereof, a local government unit exercising general governmental powers, shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and by a separate majority of the votes cast in the cities of the county, if any, considered as one unit. Members of the class on behalf of whom the plaintiffs sue are so numerous that joinder of all members is impracticable and the questions of law or fact common to the class, the claims or defenses of the parties, are typical of the claims or defenses of the class. Further, the plaintiffs have such a personal stake in the outcome of the controversy and have been so personally involved in the efforts of certain residents of the County of Niagara to bring about the adoption of a charter form of local government that their representation on behalf of all the aggrieved voters within the geographic area, to wit the voters whose vote was diluted or debased by the classification of two voting units requiring two

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separate majorities, will insure that concrete adverseness which sharpens the presentation of issues upon which the court depends for recognition of difficult constitutional questions and will insure that the interests of the entire class will be fairly and adequately protected. That further, the refusal of the Honorable John P. Lomenzo, the Secretary of State of the State of New York, to accept the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, which refusal prevents the proposed local law from becoming operative, constitutes action in opposition to the class as a whole and the grounds of the action are generally applicable to the class thereby making suitable final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

VI

The defendants in the within action are John P. Lomenzo, the Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk of the County of Niagara, New York, in whose offices the proposed local law must be filed pursuant to § 27 of the Municipal Home Rule Law of the State of New York in order to become operative. On December 8, 1972, the Secretary of State declined to accept the proposed Local Law No. 1 for filing by reason of the fact that the forwarding officer, to wit the Clerk of the Niagara County Legislature, had failed to certify that said proposed local law had been approved pursuant to § 33(7) of the Municipal Home Rule Law of the State of New York which provided that said proposed local law should not become operative unless and until it had received a majority of the votes in the area of the county outside the cities of said

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county and a separate majority in the area of the cities of said county considered as a separate unit.

VII

That in the aforesaid referendum election to determine whether or not a charter of local government, to be known as the Niagara County Charter, should be the governing instrument for the people of the geographic area, to wit Niagara County, and whether or not pursuant thereto the people of the geographic area of Niagara County should have the right to elect a Niagara County Executive and a Niagara County Comptroller, the votes cast in favor of such a proposition totalled 28,885 and the votes cast in opposition to such proposition totalled 26,508. That for the purpose of clarity at this point, the votes cast in favor of the proposed local law in the following geographic areas were as follows: within the three cities located within Niagara County—18,220; and in the areas outside of the cities of Niagara County—10,665 for a total of 28,885. That the votes cast in opposition to the proposed local law in the following areas were: within the three cities located within Niagara County—14,915; and in the areas outside of the cities of Niagara County—11,594 for a total of 26,508.

VIII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1 (h) (1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of

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Niagara, having general governmental powers over the entire geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformly and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmental laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

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IX

The provisions of Art. 9, § 1 (h) (1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of the plaintiff Shedd and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

X

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement

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of the vote of the plaintiff and members of the class based on the *prima facie* classification in units of voters by reason of their residence in the cities of the county or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but non consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.

XI

Such deprivation of the rights, privileges and immunities secured by the Constitution of the United States are causing the plaintiff Citizens for Action at a Local Level, Inc. (CALL) and the plaintiff Shedd and members of his class serious and irreparable injury and harm for which there is no plain, adequate or complete remedy to redress such wrongs other than a suit for a declaratory judgment and injunctive relief.

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XII

The application for a declaratory judgment and for injunctive relief herein restraining the enforcement, operation and execution of Art. 9, § 1 (h) (1) of the New York State Constitution insofar as it provides for separate majorities of voters residing in the cities of a county and in the area outside the cities of a county upon a referendum election to establish a county charter government, a form of general purpose local government and restraining the enforcement, operation and execution of § 33(7) of the Municipal Home Rule Law of the State of New York 35C McKinney's Cons. Laws of New York, § 33(7), on the ground that such constitutional and statutory provisions violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution may not be granted unless it is heard and determined by a district court of three judges pursuant to Title 28, U.S.C. §§ 2281, 2284. The plaintiffs do respectfully request that such a three-judge district court be convened in accordance therewith.

XIII

The venue pursuant to Title 28, U.S.C., § 1391(b) is based upon the fact that this is a civil action in which the claim, to wit the denial of the fundamental right to equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment, arose in the judicial district within which the action is commenced.

WHEREFORE, the plaintiffs respectfully pray on their behalf and on behalf of all members of the class that judgment be granted in favor of the plaintiff in this action by a district court consisting of three judges pursuant to Title 28, U.S.C., §§ 2281, 2284,

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(a) declaring that in the referendum held in the County of Niagara in the 1972 general election on the 7th day of November, 1972, upon proposition No. 5, to wit "Shall Local Law No. 1 of 1972 providing for a change in the present form of county government to a charter form of county government be approved?", in which referendum proposition No. 5 received 28,885 votes in favor thereof and 26,508 votes in opposition thereto in the total geographic area of Niagara County as one voting unit, proposition No. 5 was duly adopted pursuant to the provisions of the Equal Protection Clause of the Fourteenth Amendment and is entitled to force and effect as the form of local government for the County of Niagara in accordance with the terms thereof; and

(b) declaring that the provisions of the New York State Constitution, Art. 9, § 1 (h) (1) thereof and § 33(7) of the Municipal Home Rule Law of the State of New York, 35C McKinney's Cons. Laws of New York, § 33(7), which require that the adoption or amendment of (1) a charter form or other alternative form of county government or (2) any such form of county government which transfers one or more functions or duties of the county or of the cities, towns, villages, districts or other units of local government wholly contained in such county to each other or (3) any such form of county government which abolishes offices, departments, agencies or units of government shall not become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of the cities and in the cities of the county, if any, considered as one unit, violate the Equal Protection Clause of the Fourteenth Amendment; and

(c) declaring that the alternative forms of county government provided by Art. 9, § 1 (h) (1) of the New York State Constitution and by Article 4 of the Municipal Home Rule

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Law of the State of New York entitled, "The County Charter Law," 35C McKinney's Cons. Laws of New York, §§ 30-35, are forms of local government which provide general governmental services over an entire geographic area and in which no particular class of the population is specially interested or affected so as to warrant the exclusion of other persons from equal suffrage and, therefore, the approval or amendment of such alternative forms of county government on a referendum must be conducted in a single voting unit in order to accomplish the equal representation for equal numbers of people guaranteed by the Equal Protection Clause of the Fourteenth Amendment; and

(d) enjoining and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this court to said effect; and

(e) directing that the election of a Niagara County Executive and a Niagara County Comptroller as provided in proposition No. 5 be held at the earliest available opportunity at a general election or a special election called therefor, upon the granting and entry of a final order and judgment in favor of the plaintiff in the within action, with the terms and conditions of such election to be settled at the time of the granting and entry of an order adjudging and determining the rights, privileges and immunities of the plaintiffs and the members of the class as asserted in the within action to be secured by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; and

(f) awarding the plaintiffs such further and different relief as may seem appropriate from the pleadings and proceedings in this action and which the court may deem just

*Exhibits A and B attached to Amended Complaint.
Plaintiffs' Notice of Motion to Require
Admissions (May 27, 1974).*

and proper and further awarding the plaintiffs such costs, fees and disbursements as may be deemed appropriate for the prosecution of the within action.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Attorneys for the Plaintiffs.

[Exhibits A and B to the Amended Complaint are identical to Exhibits A and B to the Original Complaint, *supra* pp. 19-35, and thus not again reproduced].

**Plaintiffs' Notice of Motion to Require
Admissions (May 27, 1974).**

(Amended Title).

PLEASE TAKE NOTICE that upon the complaint in the within action, the undersigned will move this Court on the 10th day of June, 1974 at 10:00 a.m. on that date or as soon thereafter as counsel can be heard for an order requiring the defendants, John J. Ghezzi, (successor to John P. Lomenzo) Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York to admit the following facts pursuant to Rule 36 of the Federal Rules of Civil Procedure within two (2) days of the service of an order to such affect upon the attorney for such defendants, to wit:

1. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is not a classification of voters which is necessary to promote an articulated state goal;

*Affidavit in Support of Plaintiffs' Motion to
Require Admissions (May 28, 1974).*

2. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is not a classification created to promote a compelling state interest;

3. The classification of voters contained in Article IX § 1 (h) (1) of the New York State Constitution is a classification based solely upon the geographic location of the voter within the total area in which the election franchise is exercised.

PLEASE TAKE FURTHER NOTICE that at such time and place the plaintiffs will seek other relief that the Court deems just and proper.

Dated: May 27, 1974,
Buffalo, New York.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

**Affidavit in Support of Plaintiffs' Motion to
Require Admissions (May 28, 1974).**

(Amended Title.)

JOHN J. PHELAN being duly sworn deposes and says:

1. That he is an attorney-at-law duly licensed to practice law in the State of New York and is associated with the law firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe, 2300 Main Place Tower, Buffalo, New York 14202, the attorneys for the plaintiffs in the within action.

2. That a three judge district court, pursuant to Title 28 U.S.C. §§ 2281 and 2284 has been convened to hear and determine this action and this action has been set down for hearing by such Court on June 20, 1974.

*Affidavit in Support of Plaintiffs' Motion to
Require Admissions (May 28, 1974).*

3. That in the absence of a contention by the defendants, John J. Ghezzi, (successor to John P. Lomenzo) Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, that the separate voting units provided in Article IX § 1 (h) (1) of the New York State Constitution are necessary to promote a constitutionally permissible state goal, your deponent believes that the plaintiffs will be entitled to summary judgment in this action.

4. That in order to prove that the State of New York has no such constitutionally permissible state goal prior to the hearing of this action, your deponent desires to compel said defendants to admit the absence of such state goal pursuant to Rule 26 of the Federal Rules of Civil Procedure and since there is not sufficient time to obtain such admissions by a notice thereof, your deponent requests that an order be granted as provided for by Rule 36 of the Federal Rules of Civil Procedure.

5. That the defendants, LaVerne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York have answered and have admitted that no such constitutionally permissible state goal exists justifying the separate voting units provided for in Article IX § 1 (h) (1) of the New York State Constitution. The defendants, John J. Ghezzi, (successor to John P. Lomenzo) and Arthur Levitt have not answered the plaintiffs' complaint.

6. That the furnishing of said admissions or the denial thereof will determine if there is a question of fact in this action regarding an alleged compelling state interest and in the event that the defendants, John J. Ghezzi, (successor to John P. Lomenzo) and Arthur Levitt contend that the State of New York has such a state goal, to wit, the classification of voters

*Plaintiffs' Notice of Motion for Summary Judgment
(May 27, 1974).*

into "city" voters and into "area outside the city" voters which is constitutionally permissible, the parties should be prepared to offer proof thereof on June 20, 1974.

WHEREFORE the plaintiffs request that an order be granted requiring the defendants, John J. Ghezzi (successor to John P. Lomenzo) and Arthur Levitt to respond to the plaintiffs' request for admissions contained in the notice of motion herein, within forty-eight (48) hours of the service of an order granting such request and for such other relief that this Court may deem just and proper.

JOHN J. PHELAN.

(Sworn to May 28, 1974).

**Plaintiffs' Notice of Motion for Summary
Judgment (May 27, 1974).**

(Amended Title.)

PLEASE TAKE NOTICE that upon the complaint in the within action and upon the answer of the defendants, La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford County Clerk, County of Niagara, New York, the defendants, John J. Ghezzi, (Successor to John P. Lomenzo) The Secretary of State of the State of New York, and Arthur Levitt, Comptroller of the State of New York, having thus far failed to answer the plaintiffs' complaint and upon all the proceedings heretofore had in the within action, the undersigned will move this Court, constituted as a three judge district court, at

*Plaintiffs' Affidavit in Support of Motion for
Summary Judgment (May 28, 1974).*

a Term of said Court to be held on the 20th day of June, 1974 at 10:00 a.m. on that date or as soon thereafter as counsel can be heard for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedures of the issues contained in the plaintiffs' complaint and for such other relief that the Court may deem just and proper.

Dated: May 27, 1974,
Buffalo, New York.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

**Plaintiffs' Affidavit in Support of Motion
for Summary Judgment (May 28, 1974).**

(Amended Title.)

FRANCIS W. SHEDD being duly sworn deposes and says:

1. That he is a plaintiff in the within action and brings said action on behalf of the class of disenfranchised voters of the County of Niagara, New York, whose vote on November 7, 1972 in favor of Proposition No. 5, a proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter was diluted and debased by reason of the action by the defendants in tabulating such votes separately in the cities and in the area outside the cities of such county pursuant to Art. IX, § 1 (h)(1) of the New York Constitution.

2. That this is an action to obtain a declaratory judgment and more than twenty (20) days have expired from the commencement of the action.

*Plaintiffs' Affidavit in Support of Motion for
Summary Judgment (May 28, 1974).*

3. That the defendants Graf and Comerford have answered and have admitted the substantive allegations of the plaintiffs' complaint. The defendants Ghezzi (Successor to Lomenzo) and Levitt have not answer.

4. That the classification of voters into voting units defined as the "cities of a county" and the "area of the county outside the cities" contained in Article IX § 1 (h) (1) of the New York State Constitution is a *prima facie* violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. There is no genuine issue of any material fact and the plaintiff is entitled to judgment as a matter of law upon the complaint in the within action.

5. That the constitutional issue contained in the plaintiffs' complaint is settled in light of previous decisions of the Supreme Court of the United States and the constitutional question is adequately presented and your deponent believes that there is no issue of fact concerning the classification of voters into "city" voters and "area outside of the city" voters which would be constitutionally permissible.

WHEREFORE your deponent requests that this Court grant summary judgment declaring the rights of the plaintiffs as requested in the complaint and appropriate injunctive relief and such further relief that the Court deems appropriate, together with the costs, expenses and disbursements in this action.

FRANCIS W. SHEDD.

(Sworn to May 28, 1974).

**Answer of Defendant New York State Officials, to
Amended Complaint and Motion for
Summary Judgment (June 6, 1974).**

(Amended Title.)

Defendants John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of the State of the State of New York and Arthur Levitt, Comptroller of the State of New York, as and for their Answer to the complaint herein by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, by Michael G. Wolfgang, Assistant Attorney General, of Counsel, sets forth as follows:

FIRST: ADMITS each and every allegation contained in Section I.

SECOND: ADMITS so much in Section II as alleges that proposed Law No. 1 received 28,885 aye votes and 26,508 no votes.

THIRD: DENIES any substantial injury or interest affecting plaintiff alleged in Section III paragraph "9" and in Section XI.

FOURTH: ADMITS so much of Section III as describes the formation and activities of the Citizens for Community Action at the Local Level.

FIFTH: ADMITS each and every allegation in Section IV.

SIXTH: ADMITS so much of Section V that states the requirements of Article IX, Section 1(h)(1) of the New York State Constitution and Section 33(7) of the Municipal Home Rule Law of the State of New York.

SEVENTH: ADMITS each and every allegation in Section VI.

EIGHTH: ADMITS each and every allegation in Section V.

NINTH: ADMITS each and every allegation in Section XIII.

*Answer of Defendant New York State Officials, to
Amended Complaint and Motion for Summary
Judgment (June 6, 1974).*

TENTH: DENIES each and every allegation of the complaint not heretofore Admitted, Denied, Controverted or Qualified.

AS AND FOR A FURTHER DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS PURSUANT TO RULES 12(b) and 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE SET FORTH AS FOLLOWS:

ELEVENTH: The complaint fails to state a claim against defendants upon which relief can be granted.

TWELFTH: The complaint fails to raise substantial constitutional questions.

THIRTEENTH: The complaint fails on the ground that plaintiff is barred and collaterally estopped from raising these issues.

FOURTEENTH: That plaintiffs, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, have not shown a constitutionally protected interest or adequately presented any injury from which relief can be granted.

FIFTEENTH: The constitutional issue contained in the plaintiffs' complaint has been decided between these same parties. (*County of Niagara, New York v. State of New York*, CIV. 1972-656 decided January 29, 1973).

SIXTEENTH: The plaintiffs, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, have been afforded each and every regret mandated by the Equal Protection Clause of the United States.

SEVENTEENTH: That the plaintiff is not a disenfranchised voter.

EIGHTEENTH: That the decision to classify voters into voting units defined as "The Cities of a County" and "the area

*Answer of Defendant New York State Officials, to
Amended Complaint and Motion for Summary
Judgment (June 6, 1974).*

of the County outside the Cities", contained in Article IX, Section 1(h)(1) of the New York State Constitution was not a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution.

NINETEENTH: That the requirement of what form of county government is a purely state function and is subject to its balancing process to create reasonable classifications supported on a legitimate state interest.

TWENTIETH: There is no genuine issue of any material fact and the defendants are entitled to judgment as a matter of law.

WHEREFORE, defendants, John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, respectfully request:

(a) an order pursuant to Rule 12-b (6) of the Federal Rules of Civil Procedure dismissing the complaint; or

(b) an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to defendants; and

(c) In addition, award to defendants the costs and disbursements of this action, and grant to defendants such other and further relief as to the Court seems just and proper.

Dated: Buffalo, New York,
June 6, 1974.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendants
John J. Ghezzi and Arthur
Levitt.

**Defendant New York State Officials' Answer
to Requested Admissions (June 6, 1974).**

(Amended Title.)

John J. Ghezzi, (successor to John P. Lomenzo), The Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York, defendants, make the following statement in response to the request for admission of facts served upon them by plaintiffs on May 31, 1974:

Request No. 1—They deny the matters set forth in Request No. 1.

Request No. 2—They deny the matters set forth in Request No. 2.

Request No. 3—They deny the matters set forth in Request No. 3.

Dated: Buffalo, New York,
June 6, 1974.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for defendants,
John J. Ghezzi and Arthur Levitt.

**Proposed Niagara County Charter Adopted by the
Niagara County Legislature on August 20, 1974
for Referendum on November 5, 1974.**

NIAGARA COUNTY

**TEXT OF PROPOSED
NIAGARA COUNTY CHARTER**

NIAGARA COUNTY SEAL

Adopted August 20, 1974, by the Niagara County
Legislature, subject to approval by Referendum
on November 5, 1974.

NIAGARA COUNTY CHARTER

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ARTICLE I

NIAGARA COUNTY AND ITS GOVERNMENT.

Section 101. Title and Purpose.

Section 102. County Status, Powers and Duties.

Section 103. Effect on State Laws.

Section 104. Effect on Local Laws and Resolutions.

Section 105. Local Government Functions, Facilities &
Powers Not Transferred, Altered or Impaired.

Section 106. Contracts with Public Corporations & Public Au-
thorities.

Section 107. Definitions.

Section 101. *Title and Purpose.* This charter together with
any and all amendments hereto, if any, shall provide for and
constitute the form of government for Niagara County, and
shall supersede any and all other forms of government for the
County of Niagara, including any charter previously adopted,
and shall be known and may be cited as the "Niagara County

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Charter". Among other purposes of this charter are the following: Separation of County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule and the accomplishment of an increased efficiency, economy and responsibility in the Niagara County Government.

Section 102. *County Status, Powers and Duties.* Niagara County, upon adoption of this charter, as hereinafter provided, shall be and remain a municipal corporation under its then name and shall exercise all of the rights, privileges, functions and powers conferred upon it by this charter, code and any other applicable statute not inconsistent with such charter or code. It shall be subject to all duties and obligations imposed upon it by existing or subsequent laws not inconsistent herewith, including all powers necessarily incidental to or which may be fairly implied from the powers specifically conferred upon such county.

Section 103. *Charter Effect on State Laws.* This charter provides a form and structure of County Government in accordance with the provisions of the Municipal Home Rule Law of the State of New York, and all special laws relating to Niagara County and all general laws of the State of New York, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded

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Article I con't.

. . . in their application to Niagara County by enactment and adoption of this charter and code. Within the limitations prescribed in said Municipal Home Rule Law wherever and

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whenever any state law, general, special or local in effect, conflicts with this charter or the code or is inconsistent therewith, such law shall be deemed to the extent of such conflict or inconsistency, to be superseded by this charter and code insofar as the County of Niagara and its government are affected.

Section 104. *Charter Effect on Local Laws, and Resolutions.* All local laws and resolutions of the Legislature of the County of Niagara heretofore adopted, and all of the laws of the State relating to the Towns, Cities, Villages or Districts of the County of Niagara, shall continue in full force and effect except to the extent that such laws have been repealed, amended, modified or superseded in their application to Niagara County by the enactment and adoption of this charter and code.

Section 105. *Local Government Functions, Facilities & Powers Not Transferred, Altered or Impaired.* No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code.

Section 106. *Contracts with Public Corporations & Public Authorities.* The County of Niagara shall have power to contract with any public corporation including but not limited to a municipal district or public benefit corporation as defined in Section 66 of the General Construction Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services re-

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lating thereto shall be borne proportionately by each such contracting party as agreed upon.

Section 107. *Definitions.* Wherever used in this charter, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

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Article I con't.

- (a) "county" shall mean the County of Niagara.
- (b) "charter" and "county charter" shall mean the Niagara County charter and all amendments thereto.
- (c) "code" shall mean the Niagara County administrative code and all amendments thereto.
- (d) "county legislature" shall mean the elective legislative body of the County of Niagara.
- (e) "administrative unit" shall mean any department, executive division, institution, office or other agency of county government except a bureau, division, section or other subordinate part of any of the foregoing.
- (f) "administrative head" shall mean the head of any administrative unit.
- (g) "authorized agency" shall mean any agency authorized by this charter, administrative code, or applicable law, including but not limited to those authorized by section 224 of the county law, to receive and expend county funds for a county purpose.
- (h) "executive division" shall include but not be limited to the divisions of budget, purchase, central services,

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economic development and planning and such other divisions of the executive department as may be hereinafter authorized.

(i) "quorum" shall mean a majority of the whole number of the membership of the board, commission, body or other group of persons or officers charged with any county public power, authority or duty to be performed or exercised by them jointly, and not less than a majority of the whole number may perform and exercise such power, authority or duty. "Whole number" shall mean the total number which the board, commission, body or other group of persons or officers would have, were there no vacancies, and were none of the persons or officers disqualified from acting.

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ARTICLE II

LEGISLATIVE BRANCH.

Section 201. The County Legislature & Term of Office.

Section 202. Powers and Duties.

Section 203. Local Laws; Definitions; Power to Adopt, Amend and Repeal; Effect on Legislative Acts.

Section 204. Form and Procedure.

Section 205. Filing & Publication of Local Laws; Judicial Notice.

Section 206. Referendum.

Section 207. Effective Date.

Section 201. *County Legislature & Term of Office.* The Legislators of the County of Niagara, when lawfully con-

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vened, shall constitute the Niagara County Legislature, which shall be the legislative, appropriating, and policy-determining body of the County.

The term of office of the members of the County Legislature shall be four years and shall begin on the 1st day of January next following their election.

Section 202. *Powers and Duties.* Except as otherwise provided in this charter, the county legislature shall have and exercise all such powers and duties now or hereafter conferred or imposed on said legislature by applicable law, and any and all powers necessarily implied or incidental thereto, and in addition, shall have, but not by way of limitation, the following powers and duties:

- (a) To make appropriations, levy taxes, incur indebtedness and adopt a budget.
- (b) To exercise all powers of local legislation in relation to enacting, amending or rescinding local laws, legalizing acts, resolutions or other legislation subject to veto by the County Executive in only such instances as are specifically provided in this charter, code or by other applicable law.

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Article II con't.

- (c) By local law to adopt, amend and/or repeal an administrative code which shall set forth the details of administration of the County Government consistent with the provisions of this charter, and which code may contain revisions, simplifications, consolidations, modifications and re-statements of special laws, local laws, resolutions, rules and regulations consistent with this charter or amendments thereto.

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(d) By local law to create, alter, combine or abolish County administrative units not headed by elective officials.

(e) To adopt by resolution all necessary rules and regulations for its own conduct and procedure.

(f) Subject to the constitution and general laws of the State of New York, to fix the number of hours constituting a legal day's work for all classes of county employees and grant to the appointing officer or board authority to stagger working hours.

(g) To fix the compensation of all officers and employees paid from County funds.

(h) To fix the amount of bonds of officers and employees paid from County funds.

(i) To make such studies and investigations as it deems to be in the best interests of the County and in connection therewith to obtain and employ professional and technical advice, appoint temporary advisory boards of citizens, subpoena witnesses, administer oaths, and require the production of books, papers and other evidence deemed necessary or material to such study or inquiry.

(j) To legalize and validate any act had and taken in

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Article II con't.

. . . connection with a lawful municipal purpose or for a lawful municipal object or purpose by the governing board or other local body, officer, or agency of a municipality, wholly within the County, in the manner provided by Section Two-hundred Twenty-seven of the County Law.

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(k) To create such positions as may be deemed necessary and in the best interests of county government.

(l) To determine and make provision for any matter of County Government not otherwise provided for, including, but not by way of limitation, any necessary matter involved in the transition to this charter form of Government.

Section 203. Local Laws; Definition; Power to Adopt, and Repeal; Effect on Legislative Acts. A local law is a law adopted pursuant to this charter within the power granted by the Constitution, act of the legislature or provision of this charter, and shall not include a resolution or legalizing act.

The County may adopt, amend and repeal a local law. A local law may relate to the property, affairs or government of the county. In the exercise of such power the county may change, supersede or amend any act of the New York State Legislature except as otherwise specifically prohibited by the Municipal Home Rule Law of the State of New York. Such power shall include but not be limited to whatever power is vested in any county in the State of New York or the elective governing body thereof to adopt, amend and repeal local laws granted by any provisions of general laws, special laws, charter, administrative codes, special acts or local laws.

Section 204. Form and Procedure. Every local law shall be entitled, "Local Law No., Year" (amending, etc. or otherwise as the case may be). If a local law amends a specific state statute or specific local law, the matter to be eliminated shall be enclosed in brackets or parenthesis and the new matter

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Article II con't.

. . . underscored or italicized.

Except as may otherwise be provided in this charter, the procedure for the adoption of a local law including referendum, mandatory or permissive, shall be as provided in the code and in the absence thereof by applicable law.

Section 205. Filing and Publication of Local Laws; Judicial Notice. The filing and publication of local laws shall be as provided by The Municipal Home Rule Law or other applicable statute and the Court shall take judicial notice of all local laws and of rules and regulations adopted pursuant thereto.

Section 206. Referendum. A local law shall be subject to mandatory or permissive referendum when required or authorized by applicable law.

Section 207. Effective Date. After adoption, every local law shall become effective when filed in the Office of the Secretary of the State of New York, or on such later date as may be provided in said local law.

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ARTICLE III

EXECUTIVE BRANCH.

Section 301. County Executive; Election; Qualifications and Compensation.

Section 302. Powers and Duties.

Section 303. Removal of County Executive.

Section 304. Acting County Executive; How Designated; When to Act.

Section 305. Division of Budget.

Section 306. Division of Purchase.

Section 307. Division of Central Services.

Section 308. Division of Economic Development & Planning.

Section 309. Administrative Heads; Term; Interim Appointment; Appointment of Other Officers and Employees.

Section 310. Confirmation by County Legislature.

Section 311. Veto Power.

Section 301. *County Executive; Election; Qualifications and Compensation.* There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. The County Executive shall hold no other public office except as otherwise herein provided; shall give his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. The term of office shall begin with the first day of January, 1976, next following his election and shall be for four years.

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Section 302. *Powers and Duties.* It shall be the duty of the County Executive, subject to the provisions of this charter and code, to supervise and direct the internal structure and organization of each department. Except as may otherwise be provided in this charter and subject to confirmation by the County Legislature where provided, the County Executive shall appoint the head of every County Department and Office and members of County Boards and Commissions.

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Article III, Section 302 - con't.

In addition to any other powers and duties provided by this charter or code, the County Executive shall:

(a) Supervise and direct the internal structure and organization of each department or other administrative unit, the head of which he has power to appoint.

(b) Determine and fix real property equalization rates among the various County taxing districts for County purposes and file same with the County Legislature on or before the first day of November in each year.

(c) Designate one or several depositories located within the County for deposit of County funds, subject to approval by the County Legislature.

(d) Approve or disapprove sufficiency of sureties on official bonds and undertakings.

(e) Report to the County Legislature annually at the close of the fiscal year, or as soon thereafter, as practicable but in no event later than the first day of March, and at such other times as the County Legislature shall direct, the activities of the several administrative units and departments of the

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County during the preceding fiscal or current year in such detail as the County Legislature shall require and direct.

(f) Appoint a member of the County Legislature to serve as Chairman of such Legislature: (1) for the remainder of the calendar year in case the County Legislature has failed to select a Chairman on or before February 1, or (2) for the unexpired term of the previous Chairman in case the County Legislature has failed to select a Chairman within thirty days after a vacancy has occurred in the office of the Chairman.

(g) Perform such other duties and have such other powers as may be prescribed for him by law, code, ordinance or resolution of the County Legislature.

(h) Have such necessary, implied and incidental powers to perform and exercise the duties and functions specified above or lawfully delegated to him.

Section 303. *Removal of County Executive.* The County Executive may be removed in the manner provided in the Public Officers Law for the removal of other County officers.

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Article III con't. (2)

Section 304. *Acting County Executive; How Designated; When to Act.* The County Executive shall designate in writing one or more appointive department or executive division heads to perform the duties of the county executive during the latter's temporary inability to perform by reason of absence from the County or disability. Such appointment, with order of succession specified, shall be filed with the Clerk of the County Legislature and any such designation may be revoked at any time by the county executive filing a new designation

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with the Clerk of the County Legislature. If a vacancy occurs in the office of the county executive, the acting county executive shall serve until the vacancy is filled pursuant to this charter.

In the event that no acting county executive has been designated or is able to serve, the County Legislature shall designate an appointive department or executive division head to perform the duties of the office during the inability of the county executive to perform by reason of absence from the County or disability.

Section 305. *Division of Budget.* There shall be in the office of the county executive a division of the budget headed by a budget director who shall be appointed by, and serve at the pleasure of, the county executive, subject to confirmation by the County Legislature. The budget director shall assist in the preparation and administration of the operating and capital budgets and program, and in the study of administrative efficiency and economy.

Section 306. *Division of Purchase.* There shall be in the office of the county executive, a division of purchase, the head of which shall be a purchasing director who shall be appointed by, and serve at the pleasure, of the county executive, subject to confirmation by the County Legislature; the purchasing director shall, in accordance with the requirements as to advertising and competitive bidding, make purchases and sales of all materials, supplies and equipment and contract for rental or servicing of equipment for the County, except as otherwise provided in this charter or the code. He shall not contract for or furnish any services, equipment or other articles except upon receipt of authorized requisitions and certifications as to availability of funds.

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Section 307. *Division of Central Services.* There shall be in the office of the county executive a division of central services headed by a central services director who shall be appointed by, and serve at the pleasure of the county executive, subject to confirmation by the County Legislature. Such director shall have such powers and perform such duties in relation to and including, but not limited to, storage of supplies and materials, printing and mimeographing, mailing and data processing as shall be prescribed in the administrative code.

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Article III con't. (3)

Section 308. *Division of Economic Development & Planning.* There shall be in the office of the County Executive, a division of economic development and planning, headed by a director who shall be appointed by and serve at the pleasure of the County Executive, subject to confirmation by the County Legislature. There shall continue to be a Niagara County Planning Board as provided by law.

The director shall assist the director of the Division of Budget in the preparation and administration of the capital budget and program and shall offer grantsmanship services to the same division. The director shall assist the County Executive with other executive planning, including preparation of all county plans. The director may contract to perform professional services with any municipality or municipalities, subject to approval by the County Executive and the Legislature, and shall act as a resource service for municipalities in acquiring funds for programs from sources other than county government, and assist them in preparing

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necessary documents. The director shall conduct such studies relating to county government, business and affairs as the Executive or Legislature deem necessary, with recommendations for program implementation. The director shall also cooperate with organizations, agencies and individuals to secure desirable industrial and commercial development of Niagara County and his office shall act as a clearing house for such information concerning the County, and shall make an annual report and undertake projects designed to improve communications between local and county government and between government and private business. The director shall perform such other and related duties as required by the County Executive.

Section 309. *Administrative Heads; Term; Interim Appointment; Appointment of Other Officers and Employees.* The County Executive may appoint one head for one or more departments or other administrative units, subject to any and all requirements as to qualifications and confirmation, or may himself so serve without such confirmation.

All appointments by the County Executive shall be in writing and filed in the Office of the Clerk of the County Legislature and the County Clerk within ten days after the date of such appointment. No such appointee shall hold office beyond the term of the County Executive by whom the appointment was made except as otherwise provided by this charter and except that unless removed he shall continue to serve until his successor is appointed and has qualified or until an interim appointment is made.

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Article III con't. (5)

Upon confirmation by the County Legislature and qualifying for the office, an appointee to the position of a head of a department or any administrative unit shall enter upon the duties thereof. In the event the County Legislature has neither confirmed nor rejected an appointment within a period of forty days after the filing thereof with the Clerk of the Legislature, such appointment shall be deemed to be confirmed. Awaiting action by the County Legislature, the County Executive may designate a qualified person to serve as such head for a period not to exceed forty days in any calendar year.

All other officers and employees of each department or other administrative unit, shall be appointed by the head thereof, within appropriations therefor. The County Executive shall, within appropriations therefor, appoint without the approval of the County Legislature such officers and employees in his own office as may be necessary for the full discharge and performance of his duties.

Section 310. *Confirmation by County Legislature.* Confirmation of appointment when required shall be by affirmative vote of a majority of the whole number of the members of the County Legislature taken at a regular or special meeting.

Section 311. *Veto Power.*

(a) *General Veto Power.* The County Executive shall have power, within ten (10) days after the passage by the Niagara County Legislature of a local law or resolution, to veto any local law or resolution. A duplicate of every local law shall be certified by the clerk of the legislature and filed

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by said clerk with the County Executive within five (5) days after its passage. If the County Executive approves it, he shall sign it and return to such clerk and it shall be deemed to be adopted. If he vetoes it, he shall return it to such clerk and must set forth his written objections thereto and the clerk shall present the same with such objections to the Legislature at its next regular or special meeting and such objections shall be entered in its journal. The Legislature, within thirty (30) days after its return to the clerk may, by a two-thirds vote of the whole number of its members, override such veto. Only one vote shall be had to override such veto, which vote

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Article III con't. (6)

shall be taken by roll call and entered in the journal. If, within ten (10) days after its passage, the County Executive shall not return it either approved or vetoed to the clerk, it shall be deemed to be adopted with like effect as if he had approved and signed it.

(b) *Line Item Veto Power.* The Executive, within five days, may separately disapprove the sum of money appropriated by any one or more items, or parts of items in any law or resolution appropriating money for the use of the county government or any agency or commission, in any manner provided herein. The one or more separate items or parts of items disapproved shall be void to the extent that they have been disapproved, unless they shall be separately restored to the law or resolution and become effective by the vote of two-thirds of the members of the Legislature.

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ARTICLE IV

DEPARTMENT OF FINANCE

Section 401. Department of Finance; Commissioner; Election;
Elective Office of Treasurer Abolished.

Section 402. Powers and Duties

Section 403. Divisions of the Department

Section 401. *Department of Finance; Commissioner; Election; Elective Office of Treasurer Abolished.* There shall be a department of finance headed by a commissioner of finance who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1976, at which time a commissioner of finance shall be elected for a four year term to commence January 1, 1977, and every commissioner of finance elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office. The elective office of county treasurer shall be abolished as of January 1, 1977.

Section 402. *Powers and Duties.* Except as otherwise provided in this charter or code, the commissioner of finance shall:

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ARTICLE IV—Section 402, con't.

(a) be the chief fiscal officer and the chief accounting officer of the county;

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(b) collect, receive, have custody of, deposit and disburse all fees, revenues and other funds of the county or for which the county is responsible;

(c) submit reports to the County Legislature in such form and detail and at such times as may be prescribed by the County Legislature;

(d) perform all duties now performed by a county treasurer or other county officer in relation to the collection of taxes;

(e) except as otherwise expressly provided in this charter or code, have all the powers and perform all the duties conferred or imposed upon a county comptroller under the County Law;

(f) prescribe the form of receipts, vouchers, bills or claims to be filed by all administrative units, departments, offices or officials, institutions, and other agencies of the county;

(g) audit all books, records and accounts of the various administrative units, departments, offices or officials paid from County funds, institutions and other agencies of the County, including bond and note registers and trust accounts, and the accrual and collection of all county revenues and receipts, and for this purpose have access to all such books, records and accounts at any time, subject to the periodic audit done by the Certified Public Accountant as herein provided;

(h) examine and approve for payment all contracts, purchase orders, and other documents by which the county incurs financial obligations, having ascertained before approval that monies have been duly appropriated or provided

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for and allotted to meet such obligations and will be available when such obligations shall have become due and payable, and record such obligations and encumbrances of the respective appropriations from which such obligations are to be paid.

(i) Approve all bills, invoices, payrolls and other evidence of claims, demands, or charges paid from county funds or by any county agency or payments for which the county, its officers or agents are responsible, except when payment shall be ordered by a court of competent jurisdiction, and determine the

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ARTICLE IV—Section 402, Subd. (i) con't.

(i) . . . regularity and correctness of the same;

(j) prescribe such methods of accounting for the county and its administrative units and agencies as he may deem necessary, provided the same shall have been approved by the county executive and the state comptroller;

(k) perform such other duties pertaining to the financial affairs of the county as may be directed by the county legislature, the county executive or by any law or by any officer of the state authorized to do so by law.

Section 403. *Divisions of the Department.* There shall be the following divisions within the Department of Finance: Division of Accounting and Payroll, Division of Taxation and Division of Audit. Each division shall be headed by a Deputy appointed by the Commissioner of Finance, subject to approval by the County Legislature.

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ARTICLE V

FINANCIAL PROCEDURES

Section 501. Fiscal Year

Section 502. Preparation of Proposed Budget and Capital Program

Section 503. Proposed Budget and Capital Program by County Executive

Section 504. Budget Message

Section 505. Review of Proposed Budget; Capital Program and message

Section 506. Public Hearing

Section 507. Adoption of Budget

Section 508. Levy of Taxes; Inclusion of Reserve for Uncollected Taxes

Section 509. Appropriations; Supplemental and Emergency

Section 510. Appropriations: Reduction and Transfer After Budget Adoption

Section 511. Certain Resolutions of the County Legislature require a Two Thirds Vote

Section 512. Certain Obligations and Payments Prohibited

Section 513. Performance of Acts: Scheduling

Section 514. Summary of Receipts and Expenditures

Section 515. Independent Audit

Section 501. *Fiscal Year.* The fiscal year of the county shall begin with the first day of January and end with the last day of December of each year.

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Section 502. *Preparation of Proposed Budget and Capital Program.* The budget director shall prepare a proposed budget and capital program for submission to the County Executive in such manner and form as shall be prescribed by this charter or the code.

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Article V con't.

Section 503. *Proposed Budget and Capital Program by County Executive.* The County Executive shall submit to the clerk of the county legislature, on or before the 5th day of October of each year, for consideration by such legislature, a proposed budget for the ensuing fiscal year, and a capital program for the next six fiscal years.

Upon its submission, the proposed budget and capital program and budget message hereinafter provided shall become a public record in the office of the clerk of the County Legislature, and copies of the same shall be made available by such Clerk for distribution.

The proposed budget shall present a complete financial plan for the county and its administrative units for the ensuing fiscal year setting forth proposed expenditures and anticipated surplus and revenues, and shall include: (1) an operation and maintenance expense budget and (2) a capital budget covering debt service, down payments and other current capital financing, and proposed borrowing, if any.

Section 504. *Budget Message.* The County Executive shall also submit with the proposed budget, a message explaining the main features of the budget including among other things, a general summary thereof with such supporting schedules as

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he may deem desirable or the County Legislature may by resolution require. Such schedules shall exhibit the aggregate figures of the proposed budget in such manner as to show a balanced relationship between the total estimated expenditures and the total estimated income for the ensuing fiscal year, and shall compare these figures with the actual receipts and expenditures for the last completed fiscal year and the appropriations for the current fiscal year. Such budget message shall also outline the existing and any proposed financial policies of the county relating to the capital program describing each capital improvement proposed to be undertaken within the ensuing fiscal year, showing the estimated cost, the pending or proposed method of financing it and the projected operation and maintenance

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Article V con't. (2)

... expense. The budget message shall contain such additional information or comments as are deemed advisable by the county executive.

Section 505. *Review of Proposed Budget; Capital Program and Message.* The county legislature and the finance committee designated by such legislature shall review the proposed budget, the capital program and budget message as submitted by the county executive and shall, not later than the 7th day of November, file with the clerk of the county legislature its report including any recommendations proposed therein.

Such report shall become a public record in the office of the clerk of the County Legislature, and copies thereof shall be made available by such clerk for distribution.

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Section 506. *Public Hearing.* Not later than the 8th day of November, the clerk of the County Legislature shall cause to be published in the official newspaper and such other newspapers as may be designated by the County Legislature, a notice of the place and time, not less than five days after such publication nor later than the 21st day of November, at which the County Legislature will hold a public hearing on the proposed budget, the capital program, the budget message submitted by the County Executive and the report submitted by the County Legislature and a committee designated by such Legislature.

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Article V con't. (3)

Section 507. *Adoption of Budget.*

(a) After the conclusion of the public hearing, the County Legislature may strike items of appropriation or anticipated revenues from the tentative budget or reduce items therein, excepting appropriations required by law or for debt service.

The Legislature may add items to or increase items in such budget.

(b) If a budget has not been adopted by the County Legislature, subject to the line item veto power of the County Executive as set forth in Section 311(b) on or before the 25th day of November, then the proposed budget as submitted by the County Executive shall be the budget for the ensuing fiscal year.

(c) The budget as formally adopted should be balanced.

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(d) Five (5) copies of the budget as adopted shall be certified by the Clerk of the County Legislature and one each of such copies shall be filed in the office of the County Executive, the offices of the Budget Director, the Commissioner of Finance and the Clerk of the County Legislature.

The budget as so certified shall be printed or otherwise reproduced and copies shall be made available.

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Article V con't. (4)

Section 508. *Levy of Taxes; Inclusion of Reserve for Uncollected Taxes.* The net county tax requirement, determined by subtracting the total estimated revenues and surplus from the total proposed expenditures as set forth in the adopted budget, shall be levied in advance by the County Legislature on the taxable real property of the several tax districts of the county. The taxes so levied shall include an amount to be known as "reserve for uncollected taxes" which shall be a county charge.

The County Legislature shall fix the amount of such a sum as they may deem sufficient to produce in cash from the collection of taxes and other revenues during the year, moneys required to meet the estimated expenditures of such year, provided, however, that such reserve for uncollected taxes shall be not less than the face amount of unpaid taxes for the preceding completed fiscal year.

The amount of all taxes, special ad valorem levies and special assessments levied upon any parcel of real property by the County Legislature shall, except as otherwise expressly provided by law, be and become a lien thereon as of the first

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day of January of the fiscal year for which levied and shall remain a lien until paid.

Section 509. *Appropriations: Supplemental and Emergency.* All supplemental and emergency appropriations shall be made in accordance with the provisions of the County Law or other applicable State law.

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Article V con't. (5)

Section 510. *Appropriations: Reduction and Transfer After Budget Adoption.* If at any time during the fiscal year it appears that the revenues available will be insufficient to meet the amounts appropriated, the County Executive shall report to the County Legislature without delay the estimated amount of the deficit; remedial action taken by him, and his recommendations as to further action. The County Legislature shall take such action it deems necessary to prevent or minimize any deficit. For that purpose it may by resolution reduce one or more appropriations; but no appropriation for debt service may be reduced, and no appropriation may be reduced by more than the unencumbered balance thereof or below any amount required by law to be appropriated. The legislature may also if it so desires borrow temporarily pursuant to the local finance law in an amount not greater than such deficit for such purpose.

The County Executive may at any time during the fiscal year transfer part or all of any unencumbered appropriation balance between classifications of expenditures within the same administrative unit, provided that prior approval by resolution of the County Legislature shall be required if the proposed transfer (1) would result in an increase exceeding

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one thousand dollars annually, or such larger amount as may be prescribed by local law, during the fiscal year in any one line item in the budget as adopted, or (2) would affect any salary rate or salary total except as expressly permitted in this charter or code. If the County Executive requests in writing, the County Legislature by resolution effective immediately may transfer part or all of any unencumbered

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Article V con't. (6)

. . . appropriation balance from one county administrative unit to another provided however, that no such transfer shall be made from appropriations for debt service, and no appropriation may be reduced below any amount required by law to be appropriated.

Section 511. *Certain Resolutions of the County Legislature Require a Two-Thirds Vote.* A resolution of the County Legislature for any of the following specified purposes shall be passed by not less than a 2/3 vote of the whole number of the members of the County Legislature: (a) a supplemental or emergency appropriation; (b) the issuance of budget notes or notes in anticipation of the collection of taxes or revenues; and (c) the issuance of bonds, bond anticipation notes or capital notes.

Section 512. *Certain Obligations and Payments Prohibited.* No payment shall be authorized or made and no obligation incurred against the county except in accordance with appropriations duly made, or except as permitted otherwise by the local finance law; provided that this shall not be construed to prevent contracting for capital improvements to be financed by borrowing, or entering into any lawful contract

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or lease providing for the payment of funds beyond the end of the current fiscal year.

Section 513. *Performance of Acts: Scheduling.* Whenever the scheduling of the performance of an act shall be fixed by this article the same may be changed by the code or an amendment thereof.

Section 514. *Summary of Receipts and Expenditures.* The Commissioner of Finance shall submit to the county legislature a monthly summary of receipts and expenditures compared with the budgeted receipts and expenditures. Annually, the Commissioner shall submit a complete financial statement showing receipts and expenditures vs. budget and total assets and liabilities of the county.

Section 515. *Independent Audit.* The county legislature must provide for an annual independent audit by certified public accountants.

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ARTICLE VI

DEPARTMENT OF ASSESSMENT

Section 601. Department of Assessment; Director of Real Property Tax Services; Appointment

Section 602. Powers and Duties

Section 601. *Department of Assessment; Director of Real Property Tax Services; Appointment.* There shall be a department of assessment, the head of which shall be the director of real property tax services, who shall be appointed on the basis of his qualifications for the duties of the office. Such director

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shall be appointed by the County Executive, subject to confirmation by the County Legislature for a six year term.

Section 602. *Powers and Duties.* Except as otherwise provided in this charter or code, the director of real property tax services shall perform all of those duties required of him pursuant to Title II, Sections 1530-1536 of the Real Property Tax Law of the State of New York, or other statute supplementary or amendatory thereto, and

(a) keep a record of the transfer of title to real property and immediately notify the town or city assessors of all such transfers in each town or city as the case may be.

(b) make available a consultation and advisory service to assist local assessors in the performance of their duties and in the establishment and maintenance of suitable procedures and facilities to improve assessment records and practices.

(c) submit annually to the county executive on or before the 1st day of September, proposed county tax equalization rates consistent with standards prescribed by the legislature of the State of New York.

(d) perform all duties in relation to the extension of taxes and such other related duties in connection therewith as shall be prescribed by the county executive or county legislature;

(e) perform such other and related duties as shall be required or delegated to him by the County Executive or the County Legislature.

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ARTICLE VII

BOARD OF ACQUISITION AND CONTRACT

Section 701. Board Created; Powers and Duties

Section 702. Execution of Contracts

Section 703. Prequalification of Bidders

Section 701. *Board Created; Powers and Duties.* There shall be a board of acquisition and contract which shall consist of the County Executive, Commissioner of Public Works, and the Chairman of the County Legislature. The Board of Acquisition and Contract shall contract for and acquire by purchase or condemnation, all lands, buildings and other real property, the acquisition of which has been authorized by the County Legislature, and shall award all contracts for the construction, reconstruction, repair or alterations of all public works or improvements, subject to the approval of the County Legislature.

Section 702. *Execution of Contracts.* All contracts except for the purchase of supplies, materials, equipment and services incidental thereto shall be executed on behalf of the County by the County executive in accordance with the provisions of this Article. Whenever such contract involves the expenditure of funds in excess of those set forth in the General Municipal Law or other applicable state law, except contracts for the acquisition of real property, the contract shall be awarded to the lowest responsible bidder by sealed bids or proposals made in compliance with the public notice published at least once in a newspaper designated by the Board of Acquisition and Contract at least 10 days prior to the day on which such sealed proposals are to be opened. The

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bids or proposals shall be opened publicly in the presence of at least two members of the Board of Acquisition and Contract or their representatives. The successful bidder must give security for the faithful performance of his contract, the adequacy and sufficiency of which shall be approved by the Board of Acquisition and Contract. No contract shall be executed by the county executive on behalf of the county until the same has been approved as to form by the county attorney. A copy of each contract when executed, shall be filed with the Commissioner of Finance, together with a copy of any act, other than the annual appropriation act, upon which the right to make such contract rests.

Section 703. *Prequalification of Bidders.* The Board of Acquisition and Contract may require the prequalification of bidders on any contract, subject to such conditions or procedure as shall be established by the County Legislature.

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ARTICLE VIII

DEPARTMENT OF PUBLIC WORKS

Section 801. Department of Public Works; Commissioner; Qualifications

Section 802. Powers and Duties

Section 803. Divisions of the Department

Section 801. *Department of Public Works; Commissioner; Qualifications.* There shall be a department of public works, the head of which shall be the commissioner of public works, who shall be appointed on the basis of his experience and qualifications for the duties of the office. Such commissioner shall be appointed by the County Executive, subject to con-

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firmation of the County Legislature. Upon the effective date of this charter, the county department of highways and the department of engineering, if any, shall be divisions of the department of public works.

Section 802. *Powers and Duties.* Except as otherwise provided in this charter or code, the commissioner of public works shall:

- (a) Have all the powers and duties of a county engineer and a county superintendent of highways, pursuant to the highway law or other applicable law.
- (b) Have charge and supervision of the design, construction and alteration of the county buildings, parking fields, drives, walks, preserves, beaches, erosion projects and other structures and facilities in the nature of public works under the jurisdiction of the county.
- (c) Have charge and supervision of maintenance, repair and alteration of buildings owned or leased by the county, parking fields, drives, walks, preserves, beaches and other structures and facilities in the nature of public works under the jurisdiction of the county including custodial care, unless otherwise provided in the code.
- (d) Have such powers and duties in relation to county facilities for drainage, flood control, sanitation, sewerage, or water supply as may be prescribed in this charter, code or other applicable law.
- (e) Furnish engineering and other services to the County Legislature, the County Executive, the Department of Planning and other county departments except as otherwise provided in this charter or code.

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Article VIII con't.

(f) Have charge of and have the duty of performing such other functions concerning county property, public works and other matters as the County Legislature or the County Executive may, from time to time, direct.

Section 803. *Divisions of the Department.* There shall be the following divisions within the Department of Public Works: Division of Highways, Bridges and Structures, Division of Buildings and Grounds, Division of Engineering, and such other divisions as may be created within the department by local law or resolution of the County Legislature. Each division shall be headed by a deputy who shall be appointed by the Commissioner of Public Works, subject to approval of the County Legislature. It shall be the duty of each division head while holding such position to carry out the functions of such division as provided by the code, local law or by directives of the Commissioner, or by resolution of the County Legislature.

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ARTICLE IX

DEPARTMENT OF PARKS AND RECREATION

Section 901. Department of Parks and Recreation; Commissioner.

Section 902. Deputy Commissioner.

Section 903. Powers and Duties.

Section 904. County Parks and other Recreational Facilities.

Section 905. County Parks Commission

Section 901. *Department of Parks and Recreation; Commissioner.* There shall be a department of parks and recreation headed by a commissioner, who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 902. *Deputy Commissioner.* If and when the county legislature shall establish and create such position, there shall be a deputy commissioner of parks and recreation whose duties will be to plan and schedule all recreational activities in any and all of the facilities mentioned in section 903. He shall be appointed by the commissioner of parks and recreation, subject to confirmation by the county legislature. He shall perform such additional and related duties as the county executive may prescribe.

Section 903. *Powers and Duties.* Except as otherwise provided in this charter, the commissioner shall have supervision and control over the design, construction, operation, maintenance and repair of all county-owned and operated properties and facilities for the following purposes: parks and recreation facilities therein, docks and marinas, beaches,

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zoological and botanical gardens, forest lands and golf courses, together with buildings, structures, roads, parking areas, utilities, equipment and appurtenances, He shall perform such additional and related duties as the county executive may prescribe.

Section 904. *County Parks and other Recreational Facilities.* The county legislature is hereby authorized on behalf of the county to accept by gift and to acquire by purchase, condemnation, lease or otherwise, real property for the purposes set forth in Section 903 hereof. The county legislature may abandon such purposes by local law and may dispose of such property.

Section 905. *County Parks Commission.* There shall be a Niagara County Parks Commission appointed by the County Executive, to render advice and guidance to the parks commissioner, as provided in the Administrative Code.

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ARTICLE X

DEPARTMENT OF SOCIAL SERVICES

Section 1001. Department of Social Services; Commissioner

Section 1002. Powers and Duties of the Commissioner

Section 1001. *Department of Social Services; Commissioner.* There shall be a department of social services headed by a commissioner who shall be appointed by the County Executive, subject to confirmation by the County Legislature, pursuant to the Social Services Law of the State of New York.

Section 1002. *Powers and Duties of the Commissioner.* Except as otherwise provided in this charter and code, the commissioner of social services shall:

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(a) Have all powers and perform all the duties conferred on or required of a county commissioner of social services under the Social Services Law or other applicable law;

(b) Manage and supervise the Niagara County Infirmary, and any other public welfare institutions of the county when authorized by the county executive and approved by resolution of the County Legislature; and

(c) Perform such other and related duties as shall be required or delegated to him by the county executive and/or the County Legislature.

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ARTICLE XI

DEPARTMENT OF HEALTH

Section 1101. Department of Health; Commissioner; Qualifications

Section 1102. Powers and Duties of Commissioner

Section 1103. Board of Health; Powers and Duties

Section 1104. Sanitary Code

Section 1105. Organization of the Department

Section 1101. *Department of Health; Commissioner; Qualifications.* There shall be a department of Health headed by a commissioner of health who shall be appointed by the Board of Health of the County of Niagara, pursuant to applicable State statutes.

Section 1102. *Powers and Duties of Commissioner.* Except as otherwise provided in this charter, the commissioner of health shall have all the powers and perform all the duties

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conferred or imposed upon county or part-county health commissioners and/or county or part county boards of health by law. In addition thereto, he shall perform such other and related duties as shall be required or delegated to him by the County Executive or County Legislature.

Section 1103. *Board of Health; Powers and Duties.* There shall be in the department, a county Board of Health, the members of which shall be appointed by the Chairman of the County Legislature. The composition of such board in relation to the number of members and the professional, governmental or other representation, and the terms of such members shall be as provided in the public health law for a county board of health.

Section 1104. *Sanitary Code.* The Board of Health may formulate, promulgate, adopt and publish rules, regulations, orders and directions relating to health in the County, which shall not be inconsistent with the Public Health Law or the State Sanitary Code. Such rules, regulations, orders and directions shall be known as the County Sanitary Code. Any and all provisions of the Niagara County Sanitary Code in effect at the time of the adoption of this Charter shall remain in full force and effect until amended or repealed by the Board of Health.

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Article XI con't. (2)

The provisions of the County Sanitary Code shall have the force and effect of law. Penalties and violations of all non-conformance with such Code shall be as provided by such Code or other applicable law. Certified copies of such code shall be received in evidence in all courts and proceedings in the State.

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Section 1105. *Organization of the Department.* The department of health shall be organized into such divisions and bureaus as shall be prescribed in the administrative code.

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ARTICLE XII

DEPARTMENT OF MENTAL HEALTH

Section 1201. Department of Mental Health; Director; Qualifications

Section 1202. Powers and Duties

Section 1203. Mental Health Board

Section 1201. *Department of Mental Health; Director; Qualifications.* There shall be a department of mental health headed by a director who shall be appointed by the Mental Health Board, qualified according to the standards fixed by the State Commissioner of Mental Hygiene, in accordance with the provisions of Article 8(A) of the Mental Hygiene Law.

Section 1202. *Powers and Duties.* Except as otherwise provided in this charter, the director of mental health shall have all the powers and perform all the duties now or hereafter conferred or imposed upon a director of community mental health and/or community mental health boards by law. He shall perform such other and related duties as shall be required or delegated to him by the County Executive or County Legislature.

Section 1203. *Mental Health Board.* The Chairman of the County Legislature shall appoint a mental health board, such board to recommend and suggest to the County Executive a

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program of community mental health services and facilities and rules and regulations concerning the rendition or operation of services and facilities in the community mental health program.

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ARTICLE XIII

DEPARTMENT FOR YOUTH

Section 1301. Department for Youth; Director

Section 1302. Powers and Duties of the Director

Section 1303. Niagara County Youth Board

Section 1301. *Department for Youth; Director.* There shall be a Department for Youth headed by a director for youth who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 1302. *Powers and Duties of the Director.* The Director for Youth shall have all the powers and duties heretofore or hereafter imposed or conferred by the laws of the State of New York, and such other related duties as shall be required or delegated to him by the county executive or the county legislature.

Section 1303. *Niagara County Youth Board.* There shall be an advisory board called the Niagara County Youth Board to be appointed by the county executive in the manner prescribed by the administrative code.

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ARTICLE XIV

DEPARTMENT FOR THE AGING

Section 1401. Department for the Aging; Director

Section 1402. Powers and Duties of the Director

Section 1403. Advisory Committee

Section 1401. *Department for the Aging; Director.* There shall be a Department for the Aging, headed by a director who shall be appointed by the county executive, subject to confirmation by the county legislature.

Section 1402. *Powers and Duties of the Director.* The director shall have all the powers and duties heretofore conferred or imposed by the laws of the State of New York, and such other related duties as shall be required or delegated to him by the county executive or the county legislature.

Section 1403. *Advisory Committee.* There shall be an advisory board called the Advisory Committee to the Department for the Aging, to be appointed by the county executive in the manner prescribed by the administrative code.

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ARTICLE XV

DEPARTMENT OF PERSONNEL

Section 1501. Application of Article XV; Niagara County Civil Service Commission Continued; Civil Service Law to Apply

Section 1502. Department of Personnel; Director

Section 1503. Powers and Duties

Section 1501. *Application of Article XV; Niagara County Civil Service Commission Continues; Civil Service Law to Apply.* The Niagara County Civil Service Commission is continued for the purpose of administering Civil Service Law for Niagara County. The powers, duties and functions of the Civil Service Commission may be transferred to the Department of Personnel at the discretion of the Niagara County Legislature if found to be in the best interests of county government.

Section 1502. *Department of Personnel; Director.* There shall be a department of personnel headed by a director who shall be appointed on the basis of his administrative experience and his qualifications for the duties of the office by the County Executive subject to confirmation by the County Legislature.

Section 1503. *Powers and Duties.* The personnel director shall prepare personnel rules for county officers and employees for adoption by the county legislature. He shall administer the personnel system of the county in accordance with such personnel rules; he shall prepare and maintain a compensation plan for all county positions providing uniform pay for like services; he shall prepare and administer a merit

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system; he shall maintain personnel records for all county employees; he shall conduct continuing research of all aspects of personnel administration for the purpose of improving the morale and efficiency of county employees, and he shall perform such other duties as required by the county executive.

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ARTICLE XVI

DEPARTMENT OF LAW

Section 1601. Department of Law; County Attorney

Section 1602. Powers and Duties

Section 1603. Deputy and Assistant County Attorneys

Section 1601. *Department of Law; County Attorney.* There shall be a department of law headed by the County Attorney, who shall be appointed by, and whose term shall be the same as the County Executive. He shall be duly admitted to the practice of law in the State of New York, and a resident of the County of Niagara.

Section 1602. *Powers and Duties.* Except as otherwise provided in this charter or code, the County Attorney shall be the sole legal advisor for the County and every agency and office thereof on civil matters, and on its behalf in county matters of a civil nature, advise all county officers and employees and, where in the interest of the county, prepare all necessary papers and written instruments in connection therewith; prosecute or defend all actions or proceedings of a civil nature brought by or against the County; on request prepare resolutions, legalizing acts and local laws to be presented for action by the County Legislature, together with notices and other items in connection therewith; and perform such other

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and related duties as may be prescribed by law, by the County Executive or by resolution of the County Legislature.

Section 1603. *Deputy and Assistant County Attorneys.* The County Attorney shall have the power to appoint such deputy county attorneys, assistant county attorneys, confidential clerk, officers and employees of his department as shall be authorized by the County Legislature and within the appropriations made therefor. All deputy and assistant county attorneys shall be in the exempt class of the Civil service and shall serve at the pleasure of the county attorney.

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ARTICLE XVII

DEPARTMENT OF RECORDS

Section 1701. Department of Records; County Clerk; Election

Section 1702. Powers and Duties

Section 1701. *Department of Records; County Clerk; Election.* There shall be a department of records headed by a county clerk who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1976, at which a county clerk shall be elected for a three year term to commence on January 1, 1977, and every county clerk elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

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Section 1702. *Powers and Duties.* Except where inconsistent with this charter, the county clerk shall appoint such deputies, officers and employees of the department as may be authorized by resolution of the County Legislature and shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

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ARTICLE XVIII

DISTRICT ATTORNEY

Section 1801. *Election*

Section 1802. *Powers and Duties*

Section 1801. *Election.* There shall be a district attorney who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election, shall not take effect until the general election of 1976, at which a district attorney shall be elected for a three year term to commence on January 1, 1977, and every district attorney elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, and duly admitted to the practice of law in the State of New York. He shall devote his whole time to the duties of his office and shall hold no other public office.

Section 1802. *Powers and Duties.* The district attorney shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

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ARTICLE XIX

PUBLIC DEFENDER

Section 1901. *Public Defender, Appointment, Term*

Section 1902. *Powers and Duties*

Section 1903. *Deputy and Assistant Public Defenders*

Section 1901. *Public Defender, Appointment, Term.* There shall be a Public Defender who shall be appointed by the County Legislature and whose term of office shall be for four years. He shall be duly admitted to the practice of law in the State of New York a resident of the County of Niagara.

Section 1902. *Powers and Duties.* The office of Public Defender shall have such powers and duties as defined in Article 18 (A) and 18 (B) of the County Law of the State of New York.

Section 1903. *Deputy and Assistant Public Defenders.* The Public Defender shall have the power to appoint such confidential deputy public defenders, assistant public defenders, officers and employees of his department as shall be authorized by the County Legislature and within the appropriations made therefor. All deputy and assistant public defenders shall be in the exempt class of the civil service, and shall serve at the pleasure of the public defender.

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ARTICLE XX

SHERIFF

Section 2001. Election

Section 2002. Powers and Duties

Section 2001. *Election.* There shall be a sheriff who shall be elected from the county at large. His term of office shall be for three years, beginning with the first day of January next following his election, except that the provisions of this section with respect to such election shall not take effect until the general election of 1976, at which a sheriff shall be elected for a three year term to commence on January 1, 1977, and every sheriff elected thereafter shall have a term of three years. At the time of his election and throughout his term of office, he shall be a qualified elector of the county, shall devote his whole time to the duties of his office and shall hold no other public office.

Section 2002. *Powers and Duties.* The sheriff shall appoint such deputies, officers and employees of the department as may be authorized by resolution of the County Legislature and shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law.

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ARTICLE XXI

MEDICAL EXAMINER.

Section 2101. Application of Article XXI

Section 2102. Medical Examiner, Appointment and Qualifications

Section 2103. Powers and Duties

Section 2101. *Application of Article XXI.* The County Legislature shall have the power by local law, to abolish the office of coroner and create the office of appointive medical examiner. Such local law shall not be subject to mandatory referendum, but must be adopted and filed in the office of the Secretary of the State of New York at least 150 days prior to any general election. The terms of office of all coroners elected or appointed and holding office in the county at the time such local law is adopted and filed as hereinbefore provided, shall expire on the December 31st following the adoption of such local law, and at the general election to be held in such year and thereafter no coroner shall be elected and Article XXI of this charter and applicable provisions of the code shall become and be effective on and after January 1, next succeeding.

Section 2102. *Medical Examiner; Appointment and Qualifications.* There shall be a medical examiner who shall be appointed by and serve at the pleasure of the county executive, subject to confirmation by the County Legislature. He shall be a physician duly licensed to practice in the State of New York, qualified elector of the County, and shall have such other qualifications as may be prescribed in the code.

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Section 2103. *Powers and Duties.* The medical examiner shall have and exercise all powers and duties now or hereafter conferred or imposed upon him by any applicable law and shall perform such other and related duties as shall be required or delegated to him by the county executive or the County Legislature.

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ARTICLE XXII

OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS
AND FUNCTIONS

Section 2201. Board of Elections

Section 2202. Probation Office; Director

Section 2203. County Hospital; Board of Managers

Section 2204. Certain Boards; How Appointed

Section 2205. Fire Coordinator; How Appointed

Section 2206. Other Boards; How Appointed

Section 2207. Additional Appointments by County Executive

Section 2208. Miscellaneous Administrative Functions

Section 2201. *Board of Elections.* The Board of Elections, its powers and duties and the method of appointment of the members thereof by the County Legislature shall continue as provided by law.

Section 2202. *Probation Office; Director.* There shall be an office of probation headed by a probation director who shall be appointed in the manner provided by Section 256 (5) of the

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Executive Law of the State of New York, and shall have such powers and duties as are provided by law.

Section 2203. *County Hospital; Board of Managers.* The Board of Managers of Mount View Hospital, its powers and duties and the method of appointment of the members thereof shall continue as provided by law.

Section 2204. *Certain Board; How Appointed.* The appointment of any board or agency in relation to a county sewer, drainage or watershed protection district, if any, or to any other county district of a similar nature, shall be by the County Legislature.

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Article XXII con't.

Section 2205. *Fire Coordinator; How Appointed.* The Fire Coordinator shall be appointed by the County Legislature upon recommendation of the Fire Advisory Board. The Fire Advisory Board shall continue to be appointed as set forth in the Niagara County Fire Mutual Aid Plan.

Section 2206. *Other Boards; How Appointed.* All other boards shall continue as provided by law.

Section 2207. *Additional Appointments by County Executive.* Subject to confirmation by the County Legislature, and except as otherwise provided in this charter and code, the County Executive shall appoint the head of any other or additional administrative unit of the county including among others, the director of civil defense; county historian; sealer of weights and measures; director of veterans' services, upon consideration of recommendations of the veterans' service agencies in the county.

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Except as otherwise provided in this charter or code, other appointments to boards and like units shall be made by the county executive subject to confirmation of the county legislature. The administrator of the Workmen's Compensation however, shall continue to be appointed as now provided by local law and the laws of the State of New York applicable thereto.

Section 2208. *Miscellaneous Administrative Functions.* Administrative functions not otherwise assigned by this charter or code shall be assigned by the county executive to an administrative unit.

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ARTICLE XXIII
GENERAL PROVISIONS

Section 2301. Administrative and Advisory Boards

Section 2302. Approval of Contracts

Section 2303. Civil Service Rights Continued; Status of Certain County Officers Previously Appointed; Removal of Certain County Officers Hereafter Appointed

Section 2304. Classified Service; Exemptions

Section 2305. Filling Vacancy in Elective Office of Legislator, County Executive, Commissioner of Finance, County Clerk, District Attorney or Sheriff

Section 2306. Filling Other Vacancies

Section 2307. Power to Administer Oaths and Issue Subpoenas

Section 2301. *Administrative and Advisory Boards.* The board of trustees of the Niagara County Community College

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shall have such powers and only such powers as those specified in the Education Law of the State of New York. Except as otherwise provided in this charter or code, every other board, the members of which are appointed, shall be an advisory board consisting of such members, and the members thereof shall be appointed for such terms as are or may be provided in this charter or the code. Wherever provision is made in this charter or code for the appointment of an advisory board, the members so appointed, unless otherwise provided, shall serve at the pleasure of the appointing authority.

Section 2302. *Approval of Contracts.* Except as otherwise provided in this charter or code, every contract to which the county is a party shall require approval by the County Legislature, if said contract is for (a) the sale or purchase of real property; (b) the erection, alteration or demolition of a building or other structure; (c) the providing of facilities or the rendering of services by, for or with any other public corporation. All such contracts shall be executed by the county executive, except as otherwise provided in this charter or the code.

Section 2303. *Civil Service rights continued; status of certain county officers previously appointed; removal of certain county officers hereafter appointed.* The civil service status

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Article XXIII, Section 2303 con't.

and rights of all county employees and their beneficiaries, including but not limited to those with respect to retirement and social security, shall not be affected by this charter or code. Except as otherwise provided by this charter or code, the terms of all county officers whose appointment under this

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charter is vested in the county executive shall terminate on December 31, 1979, provided that any such officer, unless removed, shall continue to serve until his successor is appointed and has qualified or until an interim appointment is made. Any county officer appointed by the county executive for a definite term or whose appointment is subject to confirmation by the County Legislature may be removed prior to the end of such term, after receipt of written notice from the county executive. A copy of such notice shall be filed in the office of the Clerk of the County Legislature.

Section 2304. *Classified Service, Exemptions.* All positions in all departments, offices, institutions and agencies of the county, shall be in the classified service, except those held by the following: (1) elective officers; (2) heads of departments; (3) members of all boards, commissions and committees; (4) the medical examiner; and (5) the commissioner of jurors. For the purpose of this section the heads of the divisions within the executive branch, including but not limited to purchase, central services, budget and economic development & planning, shall be deemed to be heads of departments. The following positions in the classified service shall be included in the exempt class: (1) deputies who are authorized to act generally for and on behalf of their principals; (2) the confidential secretary to any officer or department head; (3) calendar clerk, personnel officer; (4) deputy and assistant district attorneys; (5) deputy and assistant county attorneys; and (6) contractors engaged to perform specific services and their employees; (7) assistant public defenders.

Section 2305. *Filling Vacancy in Elective Office of Legislator County Executive, Commissioner of Finance, County Clerk, District Attorney or Sheriff.* A vacancy, otherwise than by ex-

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piration of term in any elective county office including but not limited to the office of Legislator, County Executive, Commissioner of Finance, county clerk, district attorney or sheriff, shall be filled in accordance with Section 400(7) of the County Law.

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Article XXIII, Section 2305 con't.

The person so appointed shall hold office by virtue of such appointment until the commencement of the political year next succeeding the first annual election after the happening of the vacancy, at which election a legislator, county executive, commissioner of finance, county clerk, district attorney or sheriff, as the case may be, shall be elected for the balance of the term, if any.

Section 2306. *Filling Other Vacancies.* Except as otherwise provided in this charter or code, a vacancy in the office of the head of any administrative unit, the head of which by virtue of this charter the county executive shall have the power to appoint or remove, shall be filled by a person who shall be appointed on the basis of his administrative experience and his qualifications for the duties of such office by the county executive subject to confirmation by the county legislature where provided. Except as otherwise provided in this charter or code, the head of any administrative unit shall have the power to fill vacancies occurring within such administrative unit pursuant to the civil service law.

Section 2307. *Power to Administer Oaths and Issue Subpoenas.* The chairman of the county legislature, the commissioner of finance, the county executive, and such other county officers as may be authorized by this charter, code or

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other applicable law shall have the power to subpoena and compel the attendance of witnesses and the production of books, records and papers, as the same may be pertinent to their respective offices. Any county officer authorized to hold a hearing or conduct an investigation shall have the power to administer oaths or affirmations, subpoena witnesses and compel attendance of witnesses in connection therewith.

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ARTICLE XXIV

APPLICATION OF CHARTER

- Section 2401. Adoption of Charter; When Effective
- Section 2402. Amendment of Charter
- Section 2403. Terms of Certain Elective County Officers
- Section 2404. Continuity of Authority; Completion of Unfinished Business
- Section 2405. Separability.
- Section 2406. Charter to be Liberally Construed
- Section 2407. Charter Review Board; Establishment; Members; Term
- Section 2408. Charter Review Board; Powers and Duties

Section 2401. *Adoption of Charter; When Effective.* This charter shall become and be effective on and after January 1, 1976, upon approval by public referendum in the manner provided by law. The administrative code may be adopted

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and amended by local law at any time subsequent to the approval and adoption of this charter. The first county executive shall be elected at the general election in 1975 and shall take office on January 1, 1976. The Commissioner of finance shall be first elected at the general election in 1976 and the person then elected shall, upon qualifying, take office on January 1, 1977 for a four year term, and every commissioner of finance elected thereafter shall have a term of four years. Pending election and qualifying for office, the incumbent county treasurer, county clerk, district attorney and sheriff shall have the powers and perform the duties prescribed in this charter and code for the elective office of commissioner of finance, county clerk, district attorney and sheriff respectively.

Section 2402. *Amendment of Charter.* This charter may be amended in the manner provided by law. Except as otherwise provided in this charter, any local law which would create or abolish an elective county office, change an elective office to appointive or an appointive office to elective or change the powers of an elective county officer shall be subject to mandatory referendum. No local law which would abolish or change an administrative unit prescribed in this charter or the power of an appointive county officer in the executive branch shall be enacted before January 1, 1976.

Section 2403. *Terms of Certain Elective County Officers.* The terms of office for the county executive and commissioner of finance shall be for four years except as otherwise provided in this charter. The terms of office for the county clerk, district attorney and sheriff shall be three years except as otherwise provided in this charter.

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Article XXIV—Continued

Section 2404. *Continuity of Authority; Completion of Unfinished Business.* The performance of functions pursuant to the provisions of this charter shall be deemed and held to constitute a continuation thereof for the purpose of succession to all rights, powers, duties and obligations attached to such functions. Any proceedings or other business undertaken or commenced prior to the effective date of this charter may be conducted and completed by the county officer or administrative unit responsible therefor under this charter or code.

This charter shall not be deemed to invalidate any obligations heretofore issued by the County of Niagara or by any of its commissions, boards or agencies and such obligations shall be and remain binding obligations of the county. In the event any obligation shall have been issued in anticipation of the issuance of bonds by the county or by any of its commissions, boards or agencies, the county is hereby empowered to issue such bonds as legal and binding obligations of the county.

For the purpose of this section a public authority shall not be deemed a county commission, board or agency.

Section 2405. *Separability.* If any clause, sentence, paragraph, section or article of this charter shall be adjudged by any court of competent jurisdiction to be invalid, such adjudication shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or article thereof directly involved in the proceeding in which such adjudication shall have been rendered.

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Section 2406. *Charter to be Liberally Construed.* This charter shall be liberally construed to effectuate its objectives and purposes.

Section 2407. *Charter Review Board; establishment, members; Term.* Within five (5) years from the effective date of this charter, the County Legislature shall appoint a Charter Review Board consisting of seven legislators and five lay persons, to review the Niagara County government charter in accordance with the General Municipal Home Rule Law.

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Article XXIV—Continued

Section 2408. *Charter Review Board; Powers and Duties.* The Charter Review Board shall study all aspects of the structure of the Niagara County government, and shall recommend such changes as it deems necessary to strengthen the County government and make it more efficient, effective, and responsive. The Board shall be given the full cooperation of all officials and employees of the County government, including elected officials, and members of boards and commissions. The Board shall have full access to all necessary records of all branches and agencies of the County government except those prohibited by law. The Charter Review Board, upon the completion of its study, shall present to the County Executive and the County Legislature a report and recommendations. The County Executive and the County Legislature, upon receipt of the report and recommendations of the charter review board, shall be required to submit their reactions, in writing, to the charter review board within sixty days.

**November 22, 1974 Statement of Board of Canvassers
as to Votes Cast November 5, 1974 Referendum.***

COUNTY OF NIAGARA
BOARD OF ELECTIONS
COURT HOUSE
Telephones 434-1086—434-0729
Lockport, New York 14094
November 22, 1974

**STATEMENT OF THE BOARD OF COUNTY CAN-
VASSERS OF THE COUNTY OF NIAGARA IN RELATION
TO THE VOTES CAST FOR THE PROPOSED COUNTY
CHARTER—COUNTY OF NIAGARA.**

That the Board of County Canvassers of the County of Niagara, having met at the Board of Elections office of said County on the 6th day of November, 1974 and again on the 12th day of November, 1974, to canvass the votes given in the several Election Districts of said County at the General Election held on November 5, 1974,

DO CERTIFY AS FOLLOWS:

That it appears on such estimate and canvass that the whole number of votes given for the Proposed County Charter were Seventy five thousand seven hundred eighty six 75,786

of which

YES received Nineteen thousand three hundred sixty four 19,364

No received Seventeen thousand four hundred forty four 17,444

Blank votes were Thirty eight thousand nine hundred seventy eight 38,978
75,786

* (Marked as an Exhibit on October 8, 1975.)

**November 22, 1974 Statement of Board of Canvassers
as to Votes Cast November 5, 1974 Referendum.***

Note: Break down	YES	NO	BLANK	TOTAL
TOTAL				
Niagara Falls	7,239	4,356	13,327	24,922
Lockport	1,980	1,682	4,918	8,580
No. Tonawanda	<u>2,086</u>	<u>3,184</u>	<u>7,248</u>	<u>12,518</u>
	11,305	9,222	25,493	46,020
 Towns	 <u>8,059</u>	 <u>8,222</u>	 <u>13,485</u>	 <u>29,766</u>
	19,364	17,444	38,978	75,786

NORTON F. AURIGEMA,
Norton F. Aurigema, *Commissioner.*

PERRY CHAMBERS,
Perry Chambers, *Commissioner.*

Dated At Lockport, New York
this 22nd day of November, 1974.

**Decision of the United States District Court for the
Western District of New York, November
22, 1974 (386 F. Supp. 1).**

(Amended Title.)

Before TIMBERS, Circuit Judge, and BURKE and CURTIN, District Judges.

TIMBERS, Circuit Judge:

QUESTIONS PRESENTED

On these cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1), of the Constitution of the State of New York (McKinney 1969)¹ (hereinafter, New York Constitution), and Section 33(7) of the New York Municipal Home Rule Law (McKinney Supp. 1974-75)² (hereinafter, Home Rule Law), the following are the essential questions presented:

¹ Article IX, § 1(h)(1), of the Constitution of the State of New York provides in pertinent part:

"Counties . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

² Section 33(7) of the New York Municipal Home Rule Law provides in pertinent part:

"7. A charter law

(a) providing a county charter . . .

(b) . . . shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter

(Footnote continued on following page)

*Decision of the United States District Court for the
Western District of New York, November
22, 1974 (386 F. Supp. 1).*

(1) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as are raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

(2) If not, whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

For the reasons stated below, we hold that the instant class action is not barred by dismissal of the prior action brought by Niagara County and that the challenged dual majority requirement impairs plaintiffs' constitutional rights in the respects claimed.

Accordingly, we grant plaintiffs' motion for summary judgment and deny defendants' cross motion for summary judgment; we hold that Article IX, § 1(h)(1), of the New York

(Footnote continued from preceding page)

generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit. . . ."

*Decision of the United States District Court for the
Western District of New York, November
22, 1974 (386 F. Supp. 1).*

Constitution, and its implementing statute, Section 33(7) of the Home Rule Law, violate the equal protection clause of the Fourteenth Amendment; and we order defendants to accept for filing, and to implement, the Niagara County Charter as approved by a majority of the popular vote in the county-wide referendum held on November 7, 1972.

PARTIES TO THE ACTION

[1] Plaintiffs are Citizens For Community Action At Local Level, Inc. (CALL), a New York membership corporation, organized for the purpose of securing a county form of government for Niagara County; and Francis W. Shedd, a resident of the City of Niagara Falls, Niagara County, who voted in favor of the adoption of the Niagara County Charter in the November 1972 referendum. Shedd sues for himself and as representative of a class consisting of those residents of Niagara County whose votes for the County Charter allegedly were impaired by the dual referendum requirement. As individuals who allege that their vote was unconstitutionally diluted and debased, Shedd and the plaintiff class have standing to sue. *Gray v. Sanders*, 372 U.S. 368, 375 (1963).³

Defendants are John J. Ghezzi, Secretary of State of the State of New York; Arthur Levitt, Comptroller of the State of New York; LaVerne S. Graf, Clerk of the Niagara County

³ While we find it unnecessary to reach the issue, there is some question as to whether an organization has standing to represent its members in certain cases under the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343 (3) (1970). E.g., *Warth v. Seldin*, 495 F.2d 1187, 1190-95 (2 Cir.), cert. granted, U.S. (1974); *Aguayo v. Richardson*, 473 F.2d 1090, 1098-1101 (2 Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

*Decision of the United States District Court for the
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22, 1974 (386 F. Supp. 1).*

Legislature; and Kenneth Comerford, County Clerk of Niagara County, in whose office a local law must be filed in order to become effective.

JURISDICTION

[2] This court has jurisdiction over the subject matter and the parties pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343(3) (1970).

[3] Since the action seeks injunctive relief with respect to provisions of a New York statute and the New York Constitution, a special statutory district court of three judges was convened to hear and determine the action pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

FACTS

The essential facts alleged in the amended complaint are admitted and may be briefly summarized.

On November 7, 1972, a proposed charter providing for local government, to be known as the Niagara County Charter, was presented to the voters of Niagara County at a county-wide referendum for adoption. Pursuant to the proposed charter, the people of Niagara County would have been entitled to vote for the offices of County Executive and Comptroller. Moreover, the unit of local government provided for in the proposed charter would have had general governmental powers and would have performed substantial governmental functions, including establishment of a tax rate, equalization of assessments, issuance of bonds, maintenance

*Decision of the United States District Court for the
Western District of New York, November
22, 1974 (386 F. Supp. 1).*

of county property and roads, and the administration of health and public welfare services.

Although a majority of the county-wide vote favored adoption of the charter form of local government, the separate majority of voters in the areas of Niagara County outside of the cities voted against adoption.⁴ Accordingly, the proposed charter was not accepted for filing and ultimate implementation by defendants because of non-compliance with the dual majority requirement of § 33(7) of the Home Rule Laws.

On December 18, 1972, the County of Niagara, purporting to represent its "citizens and voters", commenced an action in the district court, seeking, inter alia, a declaration that Article IX, § 1(h)(1), of the New York Constitution, and § 33(7) of the Home Rule Law were unconstitutional as violative of the one man, one vote principle. That action was dismissed on the merits by Judge Henderson. *County of Niagara, New York v. State of New York*, Civil 1972-656 (filed April 3, 1973)⁵ (hereinafter, *County of Niagara*). On May 4, 1973, plaintiffs commenced the instant action seeking essentially the same relief.

⁴ The vote on the proposed charter was as follows:

	For	Against
Cities	18,220	14,914
Areas outside of cities	10,665	11,594
Total	28,885	26,508

The electors of the County approved the charter by a county-wide plurality of 2375 votes.

⁵ The County did not appeal from the judgment of dismissal despite the request by plaintiff Shedd that it do so.

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CLAIMS OF THE PARTIES

Plaintiffs' essential claim is that Article IX, § 1(h)(1), and § 33(7) deny them equal protection of the laws because they violate the one man, one vote principle. In support of this claim, plaintiffs point out that, pursuant to the challenged provisions, Niagara County is partitioned into two separate voting units of unequal population, one consisting of the cities within Niagara County and the other consisting of the areas of the county outside of the cities; and that the challenged provisions require a majority vote in each unit, regardless of the total popular vote, for adoption in a county-wide referendum of a county charter form of government having general governmental powers.

Accordingly, plaintiffs demand a declaratory judgment (1) that the challenged constitutional and statutory provisions deny them equal protection of the laws in violation of the Fourteenth Amendment; (2) that the Niagara County Charter was duly adopted by a majority affirmative vote in the county-wide referendum held on November 7, 1972; and (3) that the Charter is in full force and effect as the instrument defining the form of local government for Niagara County. In addition, plaintiffs demand an injunction (1) directing defendants to file and implement the Niagara County Charter as adopted; and (2) directing that an election for the offices of County Executive and Comptroller as provided in the charter be held forthwith.

Defendants' position is twofold. They assert, first, that the instant action is barred by dismissal of the prior action brought by the County of Niagara purportedly on behalf of citizens and voters raising substantially the same issues.

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Second, with respect to the merits of plaintiff's constitutional claims, defendants assert (1) that, in adopting constitutional and statutory provisions which prescribed procedures to be followed by a county in adopting a new form of government, the State of New York was exercising sovereign powers solely within the domain of state interests and therefore such provisions are insulated from judicial scrutiny; and (2) that a county-wide referendum for the adoption of a form of local government having general governmental powers, as opposed to an election of representatives in such a governmental structure, need not comply with the one man, one vote principle.

The claims of the respective parties are before us on cross motions for summary judgment.

DEFENDANTS' RES JUDICATA DEFENSE

Before reaching the merits of plaintiffs' constitutional claim, our threshold inquiry must be directed to the question of whether plaintiffs in the instant action are barred from re-litigating issues considered and rejected by the district court in the prior action, *County of Niagara, New York v. State of New York*, *supra*.

[4] Under settled law three factors must be present to support a defense of res judicata or collateral estoppel: (1) there must have been a "final judgment on the merits" in the prior action; (2) identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party to or in privity with a party to the prior action. *Kreager v. General Electric Company*, 497 F.2d 468, 471 (2 Cir. 1974), quoting from *Zdanok v. Glidden Company*, *Durkee Famous Foods Division*, 327 F.2d 944, 955 (2 Cir.), cert. denied, 377 U.S. 934 (1964).

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In the instant action, the first two factors stated above are conceded by plaintiffs. There was a final judgment on the merits in *County of Niagara* and the constitutional issues raised and decided there are essentially identical to those presented here.

As for the third requirement of *Kreager*, we hold that the private citizens who are members of the plaintiff class in the instant action are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to that action and there is no basis upon which to hold them in privity with Niagara County. See *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-04 (2 Cir. 1972), cert. denied, 411 U.S. 931 (1973); 1B Moore, *Federal Practice* ¶0.411 [1] (2d ed. 1974).

[5, 6] Absent statutory or contractual authority, a person ordinarily cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party to that litigation purported to represent all individuals who share an interest in the subject matter of the action. *Dudley v. Meyers*, 422 F.2d 1389, 1393-94 (3 Cir. 1970); 1B Moore, *supra*, ¶0411 [1], at 1253, and ¶0.411[3], at 1423. Cf. *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485 (1940); *United States v. Kabinto*, 456 F.2d 1087 (9 Cir.), cert. denied, 409 U.S. 842 (1972). Here there is no claim either that the County of Niagara was authorized to seek vindication of the constitutional rights of its "citizens and voters" or that any member of the present plaintiff class consented to being represented in the prior action by the County.⁶

⁶ Indeed, it is not at all clear that the County of Niagara had standing to represent the interests of its citizens and voters in the prior action. Note 3 *supra*.

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Defendants argue, however, that we must look through form to substance and they urge us to characterize *County of Niagara* as a class action. If that were a true class action, and assuming appropriate notice, cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-77 (1974), vacating 479 F.2d 1005 (2 Cir. 1973), and adequate representation, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940), the prior judgment would be binding on the plaintiffs here. The short answer to defendants' claim, however, is that *County of Niagara* was not brought pursuant to Fed.R.Civ.P. 23. Thus, the district court in the prior action was not called upon to make such critical initial determinations under Rule 23 as to whether the County could or would "fairly and adequately protect the interests of the class" claimed by defendants to have been represented. Fed.R.Civ.P. 23(a)(4). Nor was the court afforded the opportunity to consider the desirability or necessity of formulating provisions for notice to members of the class, Fed.R.Civ.P. 23(d)(2); cf. *Eisen v. Carlisle & Jacquelin*, *supra*, or to deal with similar procedural matters. Fed.R.Civ.P. 23(d)(5).

In short, we hold that (1) because the plaintiffs here were not parties to *County of Niagara*, (2) because the County had no valid authority to sue on behalf of its citizens and voters, and (3) because the prior action was not a proper class action brought pursuant to Rule 23, the third requirement of *Kreager* has not been satisfied. Defendants' defense of *res judicata* must fail.

PLAINTIFFS' CONSTITUTIONAL CLAIM

The gravamen of plaintiffs' complaint is that, by partitioning Niagara County into two separate voting units of

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unequal population consisting of the urban areas of the county on one hand and the rural areas on the other, and by requiring separate majorities in each for the adoption of a county charter form of local government having general governmental powers, Article IX, § 1(h)(1), and its statutory implementation, § 33(7), create arbitrary and irrational classifications based solely upon residence which result in a constitutionally impermissible voting pattern.

Defendants, on the other hand, claim that, since counties are no more than subordinate governmental instrumentalities which are created by the state and which hold and exercise power subject to its sovereign will, their internal governmental structure and the procedure for adopting it are not subject to federal judicial scrutiny. In the alternative, they contend that the one man, one vote principle does not apply to the selection of a form of government.

The precise issue here presented appears to be one of first impression.⁷ The Supreme Court, however, repeatedly has ruled on the scope and meaning of the one man, one vote principle in numerous decisions since the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962). Reasoning by analogy from those cases, we hold that the dual majority requirement of Article IX, § 1(h)(1), of the New York Constitution and § 33(7) of the Home Rule Law is not insulated from judicial scrutiny and is unconstitutional because it violates the one man, one vote principle.

[7, 8] Defendants' claim that the challenged state procedure for adopting new forms of local government is immune from judicial scrutiny is wholly without merit. We

⁷ With the exception, of course, of *County of Niagara*, the prior action.

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recognize the sovereign right of a state to create political subdivisions to assist it in carrying out state governmental functions. From this it does not follow, however, merely because subordinate governmental instrumentalities exist subject to the state's sovereign will, that a state may exercise that will so as to impair constitutionally protected rights of its citizens. As the Supreme Court stated in *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960):

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.' *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114."

Applying the principle of *Gomillion* in *Gray v. Sanders*, *supra*, the Supreme Court held that, although the State of Georgia was under no obligation to adopt a state primary procedure for the nomination of a candidate for federal and statewide officers, once it has done so the state was required to give "all who particiat[ed] in the election . . . an equal vote . . ." 372 U.S. at 379. Similarly, in *Avery v. Midland County*, 390 U.S. 474, 480 (1968), the Court held that:

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"[W]hen the State delegates law-making power to local government and provides for the election of local officials . . . , it must insure that those qualified to vote have the right to an equally effective voice in the election process."

[9] The State of New York, having chosen to create subordinate units of government, is not immune from judicial scrutiny when confronted with a claim that its exercise of sovereign power results in the imposition of unconstitutional conditions upon the voters of that political subdivision.

We turn next to the question whether the one man, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny, has been violated by the dual majority requirement which, as here applied, has had the effect of diluting the votes of the city dwellers of Niagara County by permitting the minority rural voters to veto the adoption of the proposed charter.

Defendants concede that the requirements of Article IX, § 1(h)(1), and § 33(7) would violate that principle if applied to an election of representatives. They seek to distinguish the *Gray-Reynolds-Avery* line of cases, however, on the ground that they did not involve the selection by popular vote of a form of government. They argue further that the more recent decisions of the Supreme Court in *Salter Land Co. v. Tulare Water District*, 410 U.S. 719 (1973), and *Gordon v. Lance*, 403 U.S. 1 (1971), portend a willingness on the part of the Court to sanction greater flexibility in the one man, one vote principle. They say that the dual majority requirement here challenged would pass muster under those recent decisions. We disagree.

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[10, 11] The fact that the referendum here in question did not involve election of representatives is not fatal to plaintiffs' complaint. The Supreme Court has applied the one man, one vote principle to non-representational referenda. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (general obligation bonds); *Gordon v. Lance*, *supra* (municipal bonds and tax rates); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (municipal utility revenue bonds). Nor are we persuaded by defendants' tenuous argument that the principle is inapplicable here because the challenged referendum involved not the incurring of debt but the adoption of a form of local government. Defendants have suggested no reason grounded on precedent or policy why such a referendum, which would have created the elective offices of County Executive and Comptroller need not conform to the one man, one vote principle, while the direct election of those officials would have been required to conform. E.g., *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Avery v. Midland County*, *supra*. We find no merit in the suggested distinction.

Defendants place heavy reliance on what they claim is the new flexibility of the one man, one vote principle as reflected in the decisions of the Supreme Court in *Salier Land Co. v. Tulare Water District*, *supra*, and *Gordon v. Lance*, *supra*. We think such reliance, in the context of the instant case, is misplaced.

In *Salier* the Supreme Court upheld California statutes which limited the franchise with respect to the management of local water storage and flood control units to land owners of the district "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group . . ." 410 U.S. at 728. Unlike the situation in *Salier*,

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the functions which were to have been performed by the county government provided for in the proposed Niagara County Charter were of a general governmental nature. Such governmental functions clearly would have affected all residents of Niagara County. If *Salier* is relevant at all, it would seem to support plaintiffs' position.

Defendants place their greatest reliance on *Gordon*. There the Supreme Court upheld West Virginia's constitutional and statutory requirement that political subdivisions not incur bonded indebtedness or raise tax rates beyond a stated maximum unless the proposals are approved by 60% of the popular vote. The rationale of *Gordon* is that a state has the right to protect minority interests and those of unborn generations, in certain substantive areas, by requiring a greater than majority vote.

Reasoning by analogy from *Gordon*, defendants argue that, because of the potential long-range, untold consequences of a referendum such as that here involved, the state was justified in placing the responsibility for such a fundamental change as that affecting the form of government in the hands of a super-majority. They argue further that, since each of the separate voting units within Niagara County might have vetoed the adoption of the charter, the dual majority requirement did not "authorize discrimination against any identifiable class", *Gordon*, *supra*, 403 U.S. at 7, and therefore did not violate the Fourteenth Amendment.

At first blush, this argument would appear to have merit. Upon more careful analysis, however, we find *Gordon* to be distinguishable in these material respects:

First, the dual majority requirement does not provide, as defendants suggest, for a simple super-majority vote.

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Under Article IX, § 1(h)(1), and § 33(7), there is no limit whatever to the minority domination and to the dilution of the majority vote. The Supreme Court specifically declined to consider the constitutionality of such unlimited minority veto. *Gordon, supra*, 403 U.S. at 8 n. 6.

Second, unlike the situation in *Gordon*, the dual majority requirement, as here applied, indeed did discriminate against, and did dilute and debase the vote of, an identifiable group, i.e. the city dwellers of Niagara County.

Third, the Court in *Gordon* reaffirmed, without qualification, its holdings in prior cases where an impermissible "dilution of voting power [was found] because of group characteristics—geographic location . . . —that bore no valid relation to the interest of those groups in the subject matter of the election . . ." 403 U.S. at 4. See *Cipriano v. City of Houma, supra*; *Gray v. Sanders, supra*.

[12] We hold that defendants in the instant case have failed to sustain their heavy burden of demonstrating that the urban-rural voter unit classification imposed by Article IX, § 1(h)(1), and § 33(7), bears any relationship to, or is in any way justified by, the interests of each group in the creation of a county-wide governmental structure.

The Clerk will enter judgment for plaintiffs in accordance with this opinion. No costs.

**Declaratory Judgment and Injunction,
January 9, 1975.**

(Amended Title.)

This cause came on to be heard, before a statutory three judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) consisting of The Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and The Honorable Harold P. Burke and The Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, upon cross motions for summary judgment in an equal suffrage suit seeking declaratory and injunctive relief with respect to Article IX, § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the New York Municipal Home Rule Law and the court having considered the issues and an opinion having been filed on the 22nd day of November, 1974 written by The Honorable William H. Timbers, U.S.C.J. in which The Honorable Harold J. Burke, U.S.D.J. and The Honorable John T. Curtin, U.S.D.J. concurred,

NOW upon the complaint in the action and upon the answers of each of the defendants and upon the cross motions for summary judgment and oral argument having been heard by the special statutory district court on the 20th day of June, 1974, at the United States Court House in Buffalo, New York, at which time the plaintiffs were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach & Smythe of Buffalo, New York and the defendants John J. Ghezzi, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney General of the State of New York, Michael G. Wolfgang, Assistant Attorney General, of counsel and the defendants LaVerne S. Graf, Clerk of the Niagara County Legislature and Kenneth Comerford, County Clerk of Niagara County

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were represented by Samuel L. Tavano, County Attorney, County of Niagara, Miles A. Lance, Assistant County Attorney of counsel, and due deliberation having been had, it is therefore

ORDERED that the motion of the plaintiffs for summary judgment be and it hereby is granted and the motion of the defendants for summary judgment be and it hereby is denied and further, it is hereby

ADJUDGED and decreed that:

1. Article IX § 1(h)(1) of the Constitution of the State of New York and § 33(7) of the Municipal Home Rule of the State of New York [35c McKinney's Consolidated Laws of New York, § 33(7)] are unconstitutional in violation of the guarantee of equal suffrage contained in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and

2. The application of Article IX § 1 (h) (1) of the New York State Constitution and § 33 (7) of the Municipal Home Rule Law of the State of New York [35c McKinney's Consolidated Laws of New York] to the vote upon a referendum for a Niagara County Charter in the 1972 general election has denied the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and

3. The Niagara County Charter was duly adopted by a majority affirmative vote in the county wide referendum held on November 7, 1972 and

4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further

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ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election.

W. H. TIMBERS,
William H. Timbers,
United States Circuit Judge.

HAROLD P. BURKE,
United States District Judge,

JOHN T. CURTIN,
United States District Judge.

Dated: January 9, 1975.

**Intervening Defendants' Notice of Appeal to the
Supreme Court of the United States,
March 6, 1975.**

UNITED STATES DISTRICT COURT

Western District of New York

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL
LEVEL, INC. and FRANCIS W. SHEDD, Individually and
on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New
York, ARTHUR LEVITT, Comptroller of the State of New
York, LaVERNE S. GRAF, Clerk of the County
Legislature, County of Niagara, New York and KENNETH
COMERFORD, County Clerk, County of Niagara, New
York,

Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD
SNYDER, Individually and as Supervisor of
The Town of Lockport,

Intervening Defendants.

Civil Action No. 1973-222.

Notice is hereby given that The Town of Lockport, New
York, and Floyd Snyder, individually and as Supervisor of
The Town of Lockport, the Intervening Defendants above
named, hereby appeal to the Supreme Court of the United
States from each and every part of the final judgment entered

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March 6, 1975.*

in this action on January 9, 1975 declaring Article IX Section
1(h)(1) of the Constitution of the State of New York and Sec-
tion 33(7) of the Municipal Home Rule Law of the State of
New York [Volume 35 c McKinney's Consolidated Laws of
New York, Section 33(7)] unconstitutional as being in
violation of the guarantee of equal suffrage contained in the
equal protection clause of the Fourteenth Amendment to the
United States Constitution, declaring a proposed Charter for
Niagara County to be duly adopted, and enjoining and direct-
ing the above-named defendants to file and implement the
Niagara County Charter set forth in Local Law No. of 1972
for Niagara County.

This appeal is taken pursuant to 28 U.S.C.A. Section 1253.

Dated: Buffalo, New York, March 6, 1975.

VICTOR T. FUZAK,

for

HODGSON, RUSS, ANDREWS, WOODS
& GOODYEAR,

1800 One M&T Plaza,
Buffalo, New York 14203,

Telephone: 856-4000,

and

ANDREWS, PUSATERI, BRANDT,
SHOEMAKER, HIGGINS &
ROBERSON,

Attorneys for Intervening Defendants.

**Plaintiffs' Notice of Motion to Amend
January 9, 1975 Judgment
(August 20, 1975).**

(Amended Title.)

Sirs:

PLEASE TAKE NOTICE that upon the affidavit of Francis W. Shedd, one of the plaintiffs-appellees in the above-entitled action, sworn to the 20th day of August, 1975 and upon the judgment of the three-judge District Court in this action granted the 9th day of January, 1975 and upon all the proceedings hereto had in the above-entitled action, a motion will be made before the Honorable John T. Curtin, U.S.D.J., one of the members of the three-judge District Court for further injunctive relief in accordance with Rule 62(c) FRCP in furtherance of the judgment of the court granted on the 9th day of January, 1975 in the within action.

The application to the Honorable John T. Curtin, U.S.D.J., will be made on the 25th day of August, 1975 at 11 a.m. on that date or as soon thereafter as counsel can be heard in the United States District Court in the United States Court House in the City of Buffalo, New York.

The reason for the within application is that the judgment of this court granted on January 9, 1975 enjoins the state and county defendants-appellees to implement the 1972 Niagara County charter as the instrument defining the form of local government for Niagara County. On or about August 1, 1975, the defendant-appellee Kenneth Comerford, the Niagara County Clerk, made a certification to the Niagara County Board of Elections regarding the county offices in Niagara County to be filled in the 1975 general election which is not in accordance with the express language of the judgment of this court granted on January 9, 1975 and in order to protect the

**Plaintiffs' Affidavit in Support of Motion to Amend
January 9, 1975 Judgment.**

rights of the class of aggrieved voters upon whose behalf the plaintiff-appellee brought this action, further injunctive relief or direction is required from this court.

That further the undersigned respectfully moves this court for such other or further relief as may be required to aid in the execution of the judgment of this court granted the 9th day of January, 1975.

Dated: Buffalo, New York,
August 20, 1975.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Attorneys for the Plaintiffs-Appellees.

**Plaintiffs' Affidavit in Support of Motion to
Amend January 9, 1975 Judgment.**

(Amended Title.)

Francis W. Shedd being duly sworn deposes and says:

1. That he is one of the plaintiffs-appellees in the above-entitled action.
2. That this affidavit is made in support of a motion for a further order and judgment of the United States District Court pursuant to Rule 62(c) FRCP in aid of the execution of the judgment of this court granted the 9th day of January, 1975 as required to carry out the mandate contained therein.
3. That your deponent believes that this motion is required because on or about August 1, 1975, the defendant-

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January 9, 1975 Judgment.*

appellee Kenneth Comerford, the Niagara County Clerk, was required by § 67 of the New York Election Law to certify the county offices to be filled in the 1975 general election and it appears to your deponent that said defendant-appellee did not make such certification in accordance with the express terms of the judgment of this court granted January 9, 1975, i.e. that he implement the 1972 Niagara County Charter.

4. That your deponent is advised that the defendants-appellees contend that the judgment of this court is being implemented in accordance with the provisions thereof.

5. That your deponent further believes that the protection of the substantive constitutional right of the class of aggrieved voters herein which were declared by this court and their right to a form of local government approved by such voters as a class requires adherence to and compliance with the judgment of this court and that any deviation therefrom may jeopardize such constitutional right.

6. That in order to resolve any uncertainty that may exist as to whether the defendants-appellees are complying with the terms of the final judgment granted by this court in the within action on January 9, 1975, the plaintiffs-appellees have brought this motion pursuant to the continuing power of this court to act in furtherance of its judgments.

7. That the uncertainty involves the circumstance that while the within action was pending, a second referendum was held in Niagara County in the 1974 general election upon a proposition for a county charter form of local government in which the votes cast produced the identical result as the 1972 referendum, a majority in favor countywide, a majority of city voters in favor and a majority of voters in the area outside the cities opposed.

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January 9, 1975 Judgment.*

8. That as a consequence of the decision of this court and the granting of the judgment of this court on January 9, 1975, the state and county defendants-appellees have determined to comply with such judgment, either as a matter of injunctive relief imposed upon them or as an authoritative statement of constitutional law; and to afford the plaintiffs-appellees their federal constitutional rights, by implementing the 1974 county charter.

9. That your deponent's primary purpose in this action has been to enforce his constitutional right of equal suffrage and the constitutional rights of the class of aggrieved voters he represents, and the conduct of the state-county defendants-appellees in proceeding affirmatively to bring into being a county charter form of government in Niagara County and in implementing the substantive constitutional rights of aggrieved voters is consistent with the constitutional relief sought by the voters herein and is consistent with the judgment of this court on January 9, 1975.

10. However, the state-county defendants-appellees have not sought the approval of this court for this course of conduct which approval in your deponent's judgment seems wise, particularly once the intervenor defendants-appellants contended that such course of conduct constituted an abandonment of the case or controversy which gave rise to the within action for declaratory relief and once the intervenor defendant-appellant contended that the course of action of the state-county defendants-appellees entitled the intervenor defendants-appellants to a judgment vacating the declaration of the constitutional rights of the aggrieved voters.

11. That the first point of which there might be deviation by the state-county defendants-appellees from the mandatory

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injunction of this court involved the certification of the county offices to be filled in the year 1975. On July 2, 1975 the defendant-appellee Kenneth Comerford, the Niagara County Clerk, was advised by letter on behalf of your deponent of the position of the plaintiff-appellees on the subject. A copy of such letter is annexed and designated Exhibit "A". Said letter was thereafter amplified by a letter of July 15, 1975 which is designated Exhibit "B".

12. That the plaintiffs-appellees have not received a response to Exhibit "A" or Exhibit "B". Further your deponent has learned that the defendant-appellee County Clerk filed a certification in the office of the Niagara County Board of Elections that the office of Niagara County Executive was to be filled in the 1975 general election without any further explanation.

13. That your deponent brings on this motion to protect the rights of equal suffrage of the class of voters which he represents and for the enforcement of the judgment of this court granted January 9, 1975.

14. That your deponent respectfully submits that enforcement of the final judgment by this court granted January 9, 1975 requires further action by this court in aid of the execution of the judgment including alternatively:

(a) A direction by this court to the defendant-appellee Kenneth Comerford, the Niagara County Clerk, to certify expressly to the Niagara County Board of Elections that the election of the Niagara County Executive is being conducted in accordance with the 1972 county charter;

(b) 1. A direction by this court to the defendant-appellee Kenneth Comerford, the Niagara County Clerk, to certify expressly to the Niagara County Board of Elections

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that the office of Niagara County Comptroller is a county office to be filled in the 1975 general election; or

(b) 2. A direction by this court authorizing the decision of the defendant-appellee County Clerk Kenneth Comerford that the office of Niagara County Comptroller shall not be filled in the 1975 general election because the office of Niagara County Treasurer, whom the Niagara County Comptroller is to succeed, has not expired; or

(c) A direction by this court that the action of the state-county defendants-appellees constitutes compliance with the judgment of this court which enjoined the enforcement of the voting rights of the plaintiffs-appellees and that the aggrieved class of voters are receiving the full benefit of the equal suffrage rights, the dilution and debasement of which they complained in this action, through the implementation of the 1974 county charter; and

(d) A finding by this court that there has been no abandonment of the case or controversy which gave rise to the justiciable issue in this action but on the contrary there is in being a full implementation of all provisions of the January 9, 1975 judgment of this court in accordance with its terms and consistent with the spirit and tenor thereof; and

(e) Such further relief by this court as is necessary to protect and implement the federal constitutional rights of the aggrieved voters in this action.

FRANCIS W. SHEDD.

(Sworn to August 20, 1975.)

Exhibit "A" to Plaintiffs' August 20, 1975 Affidavit.

July 2, 1975

The Honorable Kenneth Comerford
County Clerk, Niagara County
Niagara County Courthouse
Lockport, New York 14094

Re: Citizens for Community Action at the
Local Level, Inc. and F. Shedd vs.
John J. Ghezzi, *et al.* and Floyd
Snyder; Civil No. 1973-222
Our File No. 73-233-2

Dear Sir:

This letter is intended to advise you concerning the position of the appellees CALL and Shedd in the above entitled action which is on appeal to the Supreme Court of the United States.

The judgment of the three-judge United States District Court in the above entitled action granted on January 9, 1975 enjoins and directs you to implement the County Charter which was the subject of a referendum in Niagara County in the general election of 1972.

§ 67 of the Election Law of the State of New York requires you to certify to the Niagara County Board of Elections the county offices to be filled in the 1975 general election within three months of the date of the general election.

The application of the aforesaid injunction to your responsibility pursuant to such section of the Election Law requires that you certify to the Niagara County Board of Elections, on or prior to August 1, 1975, that the office of Niagara County Executive is to be filled in the 1975 general election; pursuant to the 1972 County Charter for the County of Niagara, which a duly empowered U.S. District Court has

Exhibit "A" Annexed to Plaintiffs' August 20, 1975 Affidavit.

directed and enjoined, shall be implemented as the instrument of local government for Niagara County.

An unusual occurrence has taken place concerning the appropriate governing instrument for Niagara County since the granting of such judgment, i.e., the certification by the Secretary of State of the State of New York of the County Charter which was the subject of a referendum in the general election of 1974 as well as the certification of the 1972 County Charter.

Thereafter, the County Attorney of Niagara County undertook to speak for the Niagara County defendants and to advise the Honorable John T. Curtin U.S.D.J., one of the members of the three-judge U.S. District Court that the 1974 County Charter will be implemented and not the 1972 County Charter. We have no knowledge whether the Niagara County attorney, who has represented you throughout this suit, has express authorization from you to make this statement.

Therefore, we advise you that you are directed and enjoined by the judgment of the three-judge U.S. District Court to implement the 1972 County Charter unless you receive express authorization from said court to implement the 1974 County Charter as a successor instrument of local government for Niagara County.

In the event that you elect to certify to the Niagara County Board of Elections that the office of Niagara County Executive is to be filled pursuant to the County Charter other than the one expressly authorized by the three-judge U.S. District Court, we will immediately request that the court enforce the injunctive provisions of the judgment granted January 9, 1975.

We are prepared to discuss this subject with you at your convenience, for the regularity and legality of the per-

Exhibit "A" Annexed to Plaintiffs' August 20, 1975 Affidavit.

formance of your duty of office in this instance, specifically your duty pursuant to § 67 of the New York Election Law, are of significant public interest.

Sincerely,

JOHN J. PHELAN,
Attorney for Plaintiff-Appellees.

JJP:mm

Exhibit "B" to Plaintiffs' August 20, 1975 Affidavit.

July 15, 1975

The Honorable Kenneth Comerford
County Clerk, Niagara County
Niagara County Courthouse
Lockport, New York 14094

Re: Town of Lockport, New York, et. al.
vs. Citizens for Community Action at
the Local Level, Inc., et. al.,
Sup. Ct. No. 74-1390; Dist. Ct. Civ.
No. 73-222; Our File No. 73-233-2

Dear Sir:

Would you kindly refer to our letter of July 2, 1975 in which we advised you of the position of the appellees CALL and Shedd in the above entitled action concerning the implementation of the 1972 County Charter.

In that letter, we referred to the office of Niagara County Executive in reference to the certification required to be made by you pursuant to § 67 of the New York Election Law.

We respectfully direct your attention to the 1972 Niagara County Charter, Article IV Section 401. *Department of Audit and Control; County Comptroller; Election.*

There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large. His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years.

Exhibit "B" Annexed to Plaintiffs' August 20, 1975 Affidavit.

The judgment of the District Court in the above entitled action granted January 9, 1975 enjoins the implementation of such provision of the 1972 County Charter in the 1975 general election and § 67 of the Election Law requires you, as County Clerk, to make the appropriate certification thereof to the Niagara County Board of Elections.

We respectfully reiterate our previous admonition to you concerning the injunctive provisions of the District Court judgment as it applies to you as well as our previous offer to discuss with you and your counsel the performance of your duty pursuant to § 67 of the Election Law.

Sincerely,

John J. Phelan,
for

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Buffalo, New York,
Attorneys for Appellees,

*Citizens for Community Action at
the Local Level, Inc. and
Francis W. Shedd, Individually
and on Behalf of All Others
Similarly Situated.*

cc: Samuel L. Tavano, Esq.,
County Attorney,
Niagara County.

bcc: John Simon,
Clarence Gray.

**Supreme Court Order Vacating January 9, 1975
Judgment and Remanding to District Court
(October 6, 1975).**

SUPREME COURT OF THE UNITED STATES

Town of Lockport, New York, *et al.*,

Appellants,

v.

Citizens for Community Action at the
Local Level, Inc., *et al.*

No. 74-1390

Appeal from the United States District Court for the
Western District of New York.

This Cause having been submitted on the statement of
jurisdiction, motion to affirm and suggestion of mootness,

On Consideration Whereof, it is ordered and adjudged by
this Court that the judgment of the said United States District
Court in this cause be, and the same is hereby, vacated; and
that this cause be, and the same is hereby, remanded to the
United States District Court for the Western District of New
York for reconsideration in light of the provisions of the new
charter adopted by Niagara County in 1974.

October 6, 1975

**Plaintiffs' Motion to Amend Amended Complaint,
October 7, 1975.**

SIRS:

PLEASE TAKE NOTICE that on the 8th day of October, 1975, at 2:00 P.M. on that date, the undersigned will move this Court for permission to amend the Amended Complaint in the above entitled action to set forth a cause of action for a declaratory judgment and for injunctive relief pertaining to a County Charter which was the subject of a referendum in the County of Niagara in the 1974 general election and which was approved by a majority of the votes cast in the County as a whole but did not receive a majority vote in the area outside the cities of the County as required by Article IX, § 1(h)(1) of the New York Constitution, and for such other and further relief as the Court may deem proper in the premises.

The notice herein is within the purview of the motion which is now pending before this Court dated August 20, 1975, and is appropriate in view of the direction by the Supreme Court of the United States that the issue of mootness raised pertaining to the County Charter referenda held in the general elections of 1972 and 1974 be resolved by this Court and the relief sought herein is required to protect the constitutional rights of the plaintiffs to equal suffrage pursuant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Dated: Buffalo, New York,
October 7, 1975.

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE.

**Decision of the United States District Court for the
Western District of New York, October 23, 1975.**

(Amended Title).

CURTIN, Chief Judge:

On October 6, 1975 the United States Supreme Court entered the following order in the above entitled case:

The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new chapter [sic] adopted by Niagara County in 1974.

In view of this direction, and with the consent of the other judges on the panel, I scheduled oral argument on October 8, 1975 and all parties were present. The parties stipulated that the 1974 Charter and also the proceedings in the New York State courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case. In that action, Justice Joseph P. Kuszynski, on July 31, 1975, issued a decision in which he cited the action taken by this panel as controlling in his holding that Article IX, Section (1)(h)(1) of the constitution of the State of New York and Section 33(7) of the New York State Municipal Home Rule Law are unconstitutional. The Citizens for Community Action were not named as parties in the state court action. The following is a brief summary of the various arguments made and positions taken by the parties at oral argument.

First of all, the plaintiffs filed a motion to amend the complaint. It is the purpose of the amended complaint to make the 1974 Charter part of the proceedings in this case. Procedurally, plaintiffs' theory is that the election in November proceed as planned; that the Town of Lockport be permitted to litigate the amended complaint before the three-

*Decision of the United States District Court for the
Western District of New York, October 23, 1975.*

judge court; and that for the present the court hold ruling on the remand until the court has heard full arguments from the Town. It is plaintiffs' opinion that the case is not moot, that it should be further litigated in federal court, and that there should be no abstention.

The New York State defendants agree that the case is not moot and that there should be a final determination by the Supreme Court. It is the intention of the Secretary of State to permit the 1974 Niagara County Charter to go into effect. When questioned about statewide application, it was first stated that if the question arose in other counties, the State would not follow our decision but would follow state law requiring a double majority. However, it was also stated that since Justice Kuszynski in state court has now held the same section unconstitutional following our decision, for the present the State would not apply the section to other elections in the state. Apparently, the State does not plan to appeal Justice Kuszynski's decision. It is the State's position that the court should not be concerned with the provisions of the Charter, but only with manner in which the referendum was conducted. As to the proposed amended complaint, the State questioned whether the court would be following the Supreme Court's order if it allowed the complaint to be amended.

The Niagara County defendants did not object to the amended complaint as long as the November election was allowed to proceed. In their opinion, the case is not moot and should be litigated in federal court.

Finally, the intervenor-defendant, Town of Lockport, informed the court that the Town intended to appeal Justice Kuszynski's decision, but nevertheless wants this court to hold that the question is moot. The Town admitted that there

*Decision of the United States District Court for the
Western District of New York, October 23, 1975.*

are no substantial differences between the 1972 and 1974 Charters, but argued that there was a difference in circumstances, perhaps a difference in political claimant, at the time the Charters were voted upon. The other parties are of the view that the differences between the 1972 and 1974 Charters are minimal. The Town argues that this lawsuit is moot because the 1974 Charter is now certified, thus making the validity of the 1972 Charter no longer an issue warranting resolution by this court.

After considering all of the above arguments, the court finds that this lawsuit is not moot. First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government. The Town of Lockport's argument that there was a difference in political climate when the voters approved each Charter is simply irrelevant to a determination of whether the sections are constitutional. In this regard, it should be noted that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas.

In an effort to counter the mootness argument raised by the Town of Lockport, plaintiffs have moved this court to grant the amendment of the complaint to include the 1974 Charter. However, this course of action is not necessary since the 1974 Charter is already part of the record in this case, and the United States Supreme Court has specifically directed us to consider it. The motion of the plaintiffs to amend the complaint is therefore denied.

*Decision of the United States District Court for the
Western District of New York, October 23, 1975.*

The court rejects the Town of Lockport's mootness argument because the problem presented in this case is one which is capable of repetition yet evading review. *Moore v. Ogilvie*, 394 U.S. 814 (1969). If this court were to rule that the case is moot, there is a reasonable expectation that the wrong complained of by plaintiffs would be repeated, a consideration warranting against a holding of mootness. *United States v. W. T. Grant & Co.*, 345 U.S. 629, 633 (1953). Furthermore, the certification of the 1974 Charter has done nothing to diminish the definite and concrete nature of the controversy between the parties, and this controversy continues to touch upon the legal relations of the parties to this lawsuit who have adversed legal interests. Under *Aetna Life Ins. Co. v. Hawarth*, 300 U.S. 227, 240-241 (1937), this consideration warrants a finding that there still exists an actual case or controversy necessary for this court to retain jurisdiction and render a final determination. *U. S. Const. Art. III.*

For these reasons, the judgment of this court rendered on January 9, 1975 holding Article IX(1)(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York unconstitutional is hereby reinstated and in full force and effect. In addition, the January 9, 1975 judgment is hereby amended so that the 1974 Charter, which supersedes the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County. It is further ordered that, pursuant to 28 U.S.C. § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the state court action.

I have conferred with the other members of the panel and they have given me authority to enter the present order and to sign for them. This order shall become effective upon filing,

Judgment Entered December 15, 1975.

and the parties may proceed further in accordance with the Rules of Federal Practice.

So ordered.

/s/ WILLIAM H. TIMBERS JTC
William H. Timbers
United States Circuit Judge

/s/ HAROLD P. BURKE JTC
Harold P. Burke
United States District Judge

/s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: October 23, 1975.

Judgment Entered December 15, 1975.

This cause having come on to be heard, on the 8th day of October, 1975 before the Honorable John T. Curtin, U.S.D.J., one of the members of a statutory three-judge district court, convened in this cause pursuant to 28 USC §§ 2281 and 2284 consisting of the Honorable William H. Timbers, Judge of the United States Court of Appeals for the Second Circuit and the Honorable Harold P. Burke and the Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, after a judgment of the identical Court granted the 9th day of January, 1975 was vacated by the Supreme Court of the United States in an order entered on the 6th day of October 1975 as follows:

Judgment Entered December 15, 1975.

The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provision of the new chapter (sic) adopted by Niagara County in 1974.

Now upon the order of the Supreme Court of the United States entered the 6th day of October 1975 and upon the documents filed in the Supreme Court of the United States including the briefs of all parties and a motion having been made by the plaintiffs-appellees to amend the complaint in the action to set forth a cause of action for declaratory and injunctive relief pertaining to the 1974 Niagara County Charter and upon the transcript of the oral argument of the attorneys for all parties to the action heard by the Honorable John T. Curtin, U.S.D.J., one of the members of the Special Statutory District Court on the 8th day of October 1975 at the United States Court House in Buffalo, New York at which time the plaintiffs-appellees were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach and Smythe of Buffalo, New York and the defendants-appellees Mario M. Cuomo, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney-General of the State of New York, Michael G. Wolfgang and Douglas J. Cream, assistant Attorneys-General, of counsel and La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York were represented by Samuel L. Tavano, County Attorney, County of Niagara and the intervening defendants-appellants were represented by Victor T. Fuzak of the firm of Hodgson, Russ, Andrews, Woods, and Goodyear of Buffalo, New York and the court having considered the issues remand-

Judgment Entered December 15, 1975.

ed and an opinion having been signed and filed on the 23rd day of October 1975 written by the Honorable John T. Curtin, U.S.D.J., in which the Honorable William H. Timbers, U.S.D.J., and the Honorable Harold P. Burke, U.S.D.J., concurred and due deliberation having been had, it is therefore

ORDERED, ADJUDGED and DECREED that this cause is not moot and it is further

ORDERED, ADJUDGED and DECREED that the judgment rendered by this Court on the 9th day of January, 1975 be and it is hereby reinstated and it is further

ORDERED, ADJUDGED and DECREED that the judgment of this Court, as reinstated, be and it is hereby amended at the foot as follows:

ADJUDGED and DECREED that the 1974 County Charter, Local Law No. 2 of Niagara County for 1974, which supersedes the 1972 County Charter, Local Law No. 1 of Niagara County for 1972, is in full force and effect as the instrument defining the form of local government for Niagara County.

and it is further

ORDERED that pursuant to 28 USC § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the action in the Supreme Court of the State of New York entitled, "In the Matter of Town of Lockport, New York and one vs. Mario M Cuomo, Secretary of State of the State of New York *et al.* for judgment under CPLR Article 78", and it is further

Notice of Appeal, December 18, 1975.

ORDERED that the motion of the plaintiffs-appellees to grant an amendment to the plaintiffs' complaint to include the 1974 Charter be and it is hereby denied.

s/ WILLIAM H. TIMBERS, *USCJ*
William H. Timbers
United States Circuit Judge

s/ HAROLD P. BURKE, *USDJ*
Harold P. Burke
United States District Judge

s/ JOHN T. CURTIN, *USDJ*
John T. Curtin
United States District Judge

Dated: December 10, 1975.

Notice of Appeal, December 18, 1975.

Notice is here hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the judgment entered in this action on December 15, 1975 in the United States District Court for the Western District of New York reinstating, modifying and amending the judgment of said District Court entered on January 9, 1975 which declared Article IX, Section 1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35c McKinney's Consolidated Laws of New York, Section 33 (7)] unconstitutional as being in

Notice of Appeal, December 18, 1975.

violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution; declaring a proposed Charter for Niagara County to be duly adopted; enjoining and directing the above-named Defendants to file and implement the Niagara County Charter set forth in Local Law No. 2 of 1974 for Niagara County; holding the action to be not moot; and enjoining the Intervening Defendants from proceeding with an action pending in the Supreme Court of the State of New York to restrain the implementation of proposed Local Law No. 2 of 1974. An appeal to this Court from the judgment entered on January 9, 1975 is pending under Docket No. 74-1390.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

Dated: Buffalo, New York, December 18, 1975.

s/ VICTOR T. FUZAK,
for
HODGSON, RUSS, ANDREWS, WOODS
& GOODYEAR,
and
ANDREWS, PUSATERI, BRANDT,
SHOEMAKER, HIGGINS &
ROBERSON,

Attorneys for Intervening Defendants.

**County of Niagara v. State of New York
(Civil 1972—656) Complaint,
December 14, 1972.**

UNITED STATES DISTRICT COURT
Western District of New York

COUNTY OF NIAGARA, NEW YORK,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

Civil Action No. Civ-1972-656.

FOR A FIRST CAUSE OF ACTION

1. JURISDICTION

1. The plaintiff is a duly constituted municipal corporation and a political subdivision of the State of New York, representing all the citizens and voters of the County of Niagara, with the county seat being located at Lockport, New York.

2. This is a civil action seeking declaratory injunctive and equitable relief in that the plaintiff is being deprived of its rights as secured by the Constitution of the United States of America, particularly Amendment V and Amendment XIV, Section 1, by the State of New York, pursuant to 28 United States Code, Section 1343.

**County of Niagara v. State of New York (Civil
1972-656) Complaint, December 14, 1972.**

II. THREE JUDGE COURT

3. This is a proper case for determination by a three judge court pursuant to 28 United States Code, Sections 2281 and 2284, since plaintiff seeks an injunction to restrain the enforcement, operation and execution of certain statutes and Constitutional provision of the State of New York which have statewide application on the grounds that said statutes and constitutional provision are violative of the United States Constitution.

III. VENUE

4. Venue is proper pursuant to 28 United States Code, Sections 1391 and 1392.

IV. FACTUAL ALLEGATIONS

5. On November 7, 1972, the electors of the County of Niagara voted on Proposition No. 5, a copy of which is annexed hereto and made a part hereof, marked as Exhibit "A", which proposed a county charter for the County of Niagara.

6. The vote on the proposed charter was as follows:

	<i>For</i>	<i>Against</i>
Cities	18,220	14,914
Towns	10,665	11,594
Totals	28,885	26,508

The Charter was not approved by all of the Towns of the County, considered as one voting unit.

7. The electors of the County approved the Charter by a plurality of 2,375 votes.

8. On the 1st day of December, 1972, pursuant to the applicable statutes for the certification of local laws, the

*County of Niagara v. State of New York (Civil
1972-656) Complaint, December 14, 1972.*

County Legislature of the County of Niagara certified to the Department of State of the State of New York that the proposed charter had received a majority of votes of the populace of the County of Niagara and offered the local law for filing with the Department of State.

9. On the 8th day of December, 1972, the Department of State of the State of New York returned the local law to the Clerk of the Niagara County Legislature with the advice that the certification was not proper since it did not certify that the proposed charter had received a majority of votes in the Towns of the County of Niagara considered as an independent unit.

10. The statute under which the State of New York rejected the proposed charter is Section 33 (7) of the Municipal Home Rule Law of the State of New York which provides as shown in Exhibit "B" annexed hereto and made a part hereof.

11. The defendant has contrasted the Municipal Home Rule Law, Section 33(7) to require that county charters must receive a majority of votes in all of the cities of a County voting as a unit, and all of the towns of the County voting as a unit, before it can be effective, regardless of the fact that it pass by a majority vote in the County of Niagara as a whole.

12. The proposed charter, a copy of which is annexed hereto and made a part hereof marked Exhibit "C", provides for an elective officer of County Executive, and County Comptroller among other provisions, and is effective January 1, 1973.

13. Under the Election Law of the State of New York and the regulations promulgated thereunder, primaries for said offices will be held on or about the 19th day of June, 1973.

*County of Niagara v. State of New York (Civil
1972-656) Complaint, December 14, 1972.*

14. Upon information and belief, the State of New York will not recognize any primary election resulting in a nomination of any person for those offices, based upon the defendant's rejection of the proposed charter for filing.

15. Likewise, the defendant will not recognize any person elected to those offices in the general election held in November, 1973.

16. Section 33(7) of the Municipal Home Rule Law was enacted pursuant to Article 9(h)(1) of the New York State Constitution.

17. The proposed charter of Niagara County does nothing more than enact a form of government for Niagara County without affecting the governments of any city, town or village contained in the County, and transfers no powers, duties or functions from or to any of them or to or from the County of Niagara.

FOR A SECOND CAUSE OF ACTION

18. The plaintiff realleges each and every allegation contained in paragraphs 1-17.

19. Upon information and belief, the said constitutional provision does not permit the New York State Legislature to enact a provision such as the Municipal Home Rule Law (7) requiring a separate passage of a charter by a majority vote in the cities and towns of the County of Niagara, unless there is a transfer of functions or duties to or from the County or the cities or the towns, pursuant to a proposed charter.

FOR A THIRD CAUSE OF ACTION

20. Plaintiff realleges each and every allegation contained in paragraphs 1-19.

*County of Niagara v. State of New York (Civil
1972-656) Complaint, December 14, 1972.*

21. In any event, if the Constitution of the State of New York is construed to permit such legislation, it is also repugnant to the Constitution of the United States as previously alleged.

FOR A FOURTH CAUSE OF ACTION

22. Plaintiff realleges each and every allegation contained in paragraphs 1-21.

23. Upon information and belief, the proper construction of Section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and towns of the County are required only if functions or duties are transferred to or from those entities to the County, and there were no such transfers of functions or duties under the proposed Niagara County Charter.

IV. UNCONSTITUTIONALITY
CAUSES OF ACTION ONE AND TWO

24. The Municipal Home Rule Law, Section 33(7) and Article 9(h)(1) of the New York Constitution are unconstitutional if construed as done by the defendant because it weights the vote of a citizen of the city or the town so that a majority of the voters in the County cannot pass a charter which relates exclusively to county government, in violation of Amendment V, the due process clause, and the due process clauses and equal protective clause of Amendment 14 of the United States Constitution.

V. INJUNCTIVE RELIEF AND EQUITY

25. Unless preliminary and permanent injunctive relief is granted, the proposed Niagara County Charter cannot be

*County of Niagara v. State of New York (Civil
1972-656) Complaint, December 14, 1972.*

implemented in general and in the primary and general elections forthcoming, as previously alleged, the effective date of the charter being January 1, 1973. This will result in serious, immediate and irreparable injury in that the plaintiff will be deterred and prevented from exercising fully the most fundamental Federal constitutional right.

26. Plaintiff has no adequate remedy at law.

VI. RELIEF DEMANDED

WHEREFORE, the plaintiff requests the Court to convene a three judge court as soon as possible and cause the case to be preferred above others to be heard as soon as possible for the following relief.

1. Issue a declaratory judgment declaring that Municipal Home Rule Law Section 33(7) of the State of New York and Article 9(h)(1) of the New York State Constitution are null and void on their face as applied to the plaintiff, as violative of the United States Constitution, and

2. Preliminarily and permanently enjoin and restrain the defendant, its agents, employees, or all those acting for them or at its direction, from exercising or doing anything to prevent the adoption or implementation of the proposed Niagara County Charter, and

3. Allow plaintiff costs and such other relief as to the Court seems necessary, equitable and just.

Dated: December 14, 1972.

MILES A. LANCE,

SAMUEL L. TAVANO,
Niagara County Attorney,
Attorney for Plaintiff.

*County of Niagara v. State of New York (Civil
1972-656) Decision, April 3, 1973.*

UNITED STATES DISTRICT COURT

Western District of New York

COUNTY OF NIAGARA, NEW YORK,
Plaintiff,

vs.

STATE OF NEW YORK,
Defendant.

Civil 1972-656

Appearances:

Samuel L. Tavano, Niagara County Attorney (Miles A. Lance, Assistant County Attorney, of Counsel), Lockport, New York, for Plaintiff.

Louis J. Lefkowitz, Attorney General of the State of New York, (William J. Kogan, Assistant Attorney General, of Counsel), Albany, New York, for Defendant.

Plaintiff, a political subdivision of the State of New York, has filed this action on behalf of its voters seeking a declaratory judgment and injunctive relief against the enforcement by defendant of Article 9(h)(1) of the New York

*County of Niagara v. State of New York (Civil
1972-656) Decision, April 3, 1973.*

State Constitution and section 33(7) of the Municipal Home Rule Law of the State of New York. Because the claim directs a constitutional attack upon a state constitutional provision and a state statute plaintiff also asks that a three judge court be convened, pursuant to 28 United States Code, section 2281. Defendant has moved to dismiss the complaint.

This case arose out of a referendum held at the November 7, 1972 elections in which a proposed new county charter was presented to the voters of Niagara County. The proposed charter would amend the present form of government in Niagara County by creating the offices of county executive and county controller, and by extending the term of office of county legislators from two to four years. Although the county-wide vote resulted in a majority in favor of adoption of the proposed charter, the vote in the areas outside the cities, when taken as a unit, resulted in a majority against the adoption of the proposed charter.

In December, 1972 the new charter was presented to The Secretary of State of the State of New York for filing. The Secretary of State refused to file the new charter because County of Niagara officials could not certify that it had been passed by a majority vote both in the cities of the county and in the area outside the cities, each considered as an independent unit. This action was taken by the Secretary of State pursuant to section 33 of the Municipal Home Rule Law, Subdivision 7, which provides as follows:

7. A charter law

(a) providing a county charter, or

(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a

*County of Niagara v. State of New York (Civil
1972-656) Decision, April 3, 1973.*

city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of cities and (b) in the area of the cities of the county, if any, considered as one unit

This statute was enacted pursuant to Article 9, Section 1, subdivision (h)(1) of the New York State Constitution, which provides:

"(h)(1) Counties, . . . shall be empowered . . . to adopt, amend or repeal alternative forms of county government. . . . Any such form of government . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit."

Plaintiff contends (1) that section 33 (7) of the municipal Home Rule Law was enacted in violation of Article 9(h)(1) of

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the New York State Constitution, since the state constitution did not contemplate that separate majorities would be required to adopt a new charter that did not provide for a transfer of functions to or from the county or the cities or the towns; (2) that even if the state constitution is construed to permit such legislation, both the state constitutional provision and the section of the Municipal Home Rule Law in question violate the due process and equal protection clauses of the United States Constitution, as interpreted by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, and subsequent cases; (3) even if both the state constitutional provision and the state statute are held to be constitutional, the proper construction of section 33(7) of the Municipal Home Rule Law is that separate majorities in cities and areas outside the cities are required only if functions or duties are transferred to or from those entities to the county by provisions of the proposed charter.

With regard to plaintiff's second claim, it is true that in *Baker v. Carr, Id.*, and in subsequent cases the Supreme Court set forth the principle that in statewide and congressional elections, one person's vote must be counted equally with those of all other voters in a state. See, *Gray v. Sanders*, 372 U.S. 368; *Wesberry v. Sanders*, 376 U.S. 1; *Reynolds v. Sims*, 377 U.S. 533. However, the one man one vote concept is not without its limits. In *Wells v. Edwards*, 41 U.S.L.W. 3370 (U.S. Jan. 9, 1973) the court refused to apply the concept of one man one vote to the establishment of districts for the election of judges.

This case deals with a referendum held for the purpose of obtaining voter approval of a new form of county government. A county, being a political subdivision of a state, is, in a sense, a creature of that state. *cf. Trenton v. New Jersey*, 262

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U.S. 182. The State of New York has adopted a constitutional provision allowing counties within the state to create alternate forms of government. The New York State legislature has acted to implement that state constitutional provisions by enacting the Municipal Home Rule Law, which further spells out the procedures to be followed by a county in adopting a new form of government. The State of New York was acting within its sovereign power in adopting the constitutional and statutory provisions referred to above. Where a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

Title 28, United States Code section 2281 does not require the convening of a three judge court when the constitutional attack upon a state statute is insubstantial. *Bailey v. Patterson*, 369 U.S. 31; *Goosby v. Osser*, 41 U.S.L.W. 4167 (U.S. Jan. 17, 1973). The facts presented by this case do not raise a substantial federal question.

In light of the foregoing, this court does not reach the other contentions of the Plaintiff. Plaintiff's motion to convene a three-judge court is denied. The motion of Defendant to dismiss is granted.

It is so ordered.

JOHN O. HENDERSON,
United States District Judge.

Dated: April 3, 1973.

**Affidavit of Plaintiff for Correction of Record
(July 1, 1976).**

(Amended Title.)

FRANCIS W. SHEDD, Being duly sworn deposes and says:

1. That he is a plaintiff-appellee in the within action and is the voter of Niagara County who brought this class action individually and on behalf of the class of voters who voted in favor of the County Charter form of local government for Niagara County.

2. That your deponent has read the affidavit that his attorney John J. Phelan prepared and swore to on August 3, 1973 upon information and belief obtained from your deponent. That the date of your deponent's appearance before the Niagara County legislature is stated in Mr. Phelan's affidavit to have been on May 4, 1973. That said fact is erroneous. Your deponent appeared before the Niagara County legislature on May 1, 1973, and the events are hereafter described and documented by newspaper reports.

3. That on May 1, 1973 your deponent appeared before the Niagara County legislature at a regular meeting thereof and advised the members thereof that he was a voter of the City of Niagara Falls, New York; that he had voted in favor of the proposition for the adoption of the Niagara County Charter; that it was his contention that he was an aggrieved voter who had been deprived of his right of equal suffrage guaranteed by the Fourteenth Amendment of the United States Constitution; that he intended to intervene in the pending action and to move to amend the complaint or to commence a separate class action forthwith for a declaratory judgment and a determination of whether the constitutional rights of the voters of Niagara County to equal protection pursuant to the Fourteenth Amendment had been violated

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(July 1, 1976).*

and to join such action with the pending action, and he requested and urged the Niagara County Legislature not to permit the order of dismissal granted by the Honorable John O. Henderson, U.S.D.J. on April 3, 1973 to become final and further requested the Niagara County Legislature to direct its County Attorney to file a notice of appeal.

4. That on that date, May 1, 1973 the Niagara County Legislature, in session, declined to direct the Niagara County Attorney to file a notice of appeal and in fact no notice of appeal was ever filed.

5. That your deponent's appearance before the Niagara County legislature was reported in the press on May 2, 1973, specifically in the Buffalo Courier Express, Buffalo, New York, a copy of which article is annexed to the within affidavit and designated Exhibit A.

6. That your deponent respectfully requests this Court to authorize the inclusion of this affidavit as part of the record of the within action and to authorize its filing in the office of the Clerk of the U.S. District Court for the Western District and to authorize its transmittal to the Clerk of the Supreme Court of the United States for inclusion with the record and to authorize the inclusion of the within affidavit in the joint appendix together with such other and further relief as this Court may deem just and proper.

FRANCIS W. SHEDD.

(Sworn to July 1, 1976.)

Exhibit A.

Buffalo Courier-Express, Wednesday, May 2, 1973

LEGISLATORS BALK ON CHARTER ACTION

Courier-Express Lockport Bureau

LOCKPORT—The Niagara County Legislature Tuesday refused to take further action on a county charter which was rejected by the state even though it was approved by the majority of voters last November.

The county charter was approved on a Countywide basis by 1,500 votes last November.

The charter was ruled invalid by the state however because it was defeated by the voters of the county's 12 towns as a total unit. Voters in the county's three cities approved the charter by enough of a majority to overcome the town results.

State officials ruled that both the cities and towns had to approve the charter as units.

The county appealed the state's decision but Federal Judge John O. Henderson ruled last month that the county had no grounds for federal action.

Francis W. Shedd, a Niagara Falls lawyer who is a member of the State Joint Legislative Committee, said he is planning to institute a suit to test the constitutionality of the state charter which requires a dual referendum on the charter vote.

He said he is taking the action as an aggrieved voter.

Shedd asked that the county file an appeal to Judge Henderson's decision by Thursday, the county's deadline for making the appeal. He added that if the county did not wish to file the appeal by Thursday, then it could ask for a 30-day extension on the appeal deadline.

Exhibit A Annexed to Affidavit.

Shedd said he would like the county to continue the appeal so that he could get in on the "ground floor" of the matter.

Shedd served as counsel to the Joint Legislative Committee on Metropolitan and Regional Areas Studies.

Shedd will be represented in his suit by John Phelan, a Buffalo lawyer who for many years served as chief counsel to former State Sen. Earl W. Brydges of Niagara Falls.

Several members of the county legislature questioned Shedd on the matter.

The Legislature then tabled a motion presented by Legislator Louis E. Caggiano, of Niagara Falls, asking that a new charter commission be formed and that the Legislature go on record opposing the double referendum issue.

Another motion made by Legislator Fremont Ferchen, Town of Wheatfield asking simply that a new charter commission be formed, died on the floor when it did not receive a second.

In other matters Tuesday the Legislature:

—Refused to accept a motion presented by Caggiano asking that the county's Social Services Dept. be forbidden to provide payment for abortions for women who are receiving public assistance. No action was taken on the matter because the resolution was not filed in time to be placed on the meeting's agenda. County Attorney Samuel L. Tavano also warned legislators that the motion would probably be ruled illegal because of the question of constitutionality.

—Heard a detailed report from Col. Robert Moore, head of the Buffalo office of the U.S. Army Corps of Engineers, concerning the proposed All-American Canal which would run through the county. Col. Moore said the estimated con-

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struction cost of the canal will be about \$1.5 billion. The canal would be paid for with federal funds.

—Designated the City of Niagara Falls Dept. of Manpower as the official agency of the county's Manpower Training program.

**District Court July 2, 1976 Order
Correcting Record.**

(Amended Title.)

A motion having been made for an Order authorizing the inclusion in the record of the proceedings in this action of an affidavit of plaintiff-appellee, Francis W. Shedd, sworn to July 1, 1976 to correct an alleged error of fact in the record of the proceedings in this action and said motion having come on duly to be heard,

NOW upon reading and filing the notice of motion dated July 1, 1976, the affidavit of Francis W. Shedd, sworn to July 1, 1976, the affidavit of John J. Phelan, attorney at law, sworn to July 1, 1976 and Moot, Sprague, Marcy, Landy, Fernbach & Smythe, attorneys for the plaintiff-appellees, John J. Phelan, of counsel, having appeared in support of the motion and Victor T. Fuzak, attorney for the intervenor-appellants, Town of Lockport, New York and Floyd Snyder, having advised the Court that he was not opposing the motion and due deliberation having been had, it is hereby

ORDERED that the motion be, and it hereby is granted and the affidavit of Francis W. Shedd, sworn to July 1, 1976 is ordered to be included in the record of the proceedings in this action: to be filed with this Order in the office of the Clerk of

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the United States District Court for the Western District of New York and to be transmitted to the office of the Clerk of the Supreme Court of the United States as part of the proceedings in this action; and said affidavit and this Order is authorized to be included in the joint appendix on the appeal to the Supreme Court of the United States as part of the cross-designation of the appellees Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd.

JOHN T. CURTIN,
U.S.D.J.

July 2, 1976.